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INTERNATIONAL LAW

26





# INTERNATIONAL LAW

## A TREATISE

By L. OPPENHEIM, M.A., LL.D.

LATE WHEWELL PROFESSOR OF INTERNATIONAL LAW IN THE UNIVERSITY  
OF CAMBRIDGE; LATE MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW

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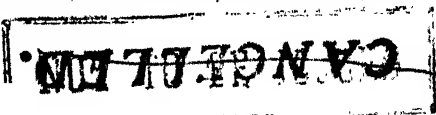
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SIXTH EDITION.

EDITED BY

H. LAUTERPACHT, M.A., LL.D.

WHEWELL PROFESSOR OF INTERNATIONAL LAW IN THE UNIVERSITY  
OF CAMBRIDGE; OF GRAY'S INN, BARRISTER-AT-LAW



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# P R E F A C E

## TO THE SIXTH EDITION

THE present volume goes to press in June 1940—at a time of an anxious phase of a war whose outcome is bound to influence decisively the substance and the structure of International Law in the coming generation. In the meantime the exposition of the existing law must disregard the possibility or the prospects of its changes in the future or the fact of its violations in the past. Thus the law relating to the settlement of disputes remains unaffected by the breakdown of the machinery of pacific settlement, and is, accordingly, treated in full in Part I (Disputes) of this volume, subject to the legally relevant developments which have intervened since the last edition in 1935. Changes of this character have also been incorporated in the two other Parts of the volume, namely, those covering the Law of War and Neutrality. They include the legal aspects of the events connected with the war which broke out with Germany in September 1939.

In this edition I have made further progress in the work of re-writing and expanding this treatise. Substantial portions of the preceding edition have been omitted, and the size of type has been reduced so as to conform with that used in Volume I. It has thus been found possible not to exceed the number of pages of the previous edition.

The following are the Sections which are new, or practically new: 6*a* (Consultation); 15 (The Law Applied by Arbitrators); 25*i* (Treaties for the Limitation of Armaments since 1918); 52*ab* (Cases of Declared 'Resort to War'); 52*f* (Sanctions in the Theory and the Practice of the League); 57*a* (Modern Developments affecting the Distinction between Armed Forces and Civilians); 71*a* (Mandated Territories as a Region of War); 76 (Recognition of Belligerency); 76*a* (Recognition of Subjects of the Enemy as Allied Belli-

gerents); 162*a* (Incitement of Enemy Subjects to Rebellion); 181*a* (Defensively Armed Merchant-Vessels); 182*a* (Submarine Contact Mines); 214*b* (The Practice of the World War and the Hague Rules of Air Warfare); 214*c* (Rules of Air Warfare in relation to Rules of War on Land and at Sea); 214*d* (Instruments of Force in Aerial Warfare); 214*f* (Attack on Enemy Civil Aircraft); 214*g* (Aircraft Attack on Enemy Merchant-Vessels); 253 (The Plea of Superior Orders); 292*A* (Neutrality after the World War); 296 (Neutrality as an Attitude of States); 296*a* (State Control over Private Activities and the Law of Neutrality); 311*a* (Municipal Neutrality Laws in Case of Insurgency); 312*a* (Changes of Neutrality Regulations during the War); 325*A* (The Case of the *Altmark*); 333*a* (Defensively Armed Merchantmen in Neutral Ports); 335*a* (The Washington Rules and Aircraft); 380*b* (Blockade by Aircraft); 390*c* (The Long-Distance Blockade after the World War); 413*a* (Seizure of Enemy Reservists); 421*b* (The Navicert System).

I am indebted to Sir William Malkin, G.C.M.G., C.B., Sir Stephen Gaselee, K.C.M.G., C.B.E., F.B.A., Dr. A. D. McNair, C.B.E., F.B.A., and Dr. J. M. Spaight, C.B., C.B.E., LL.D., for generous assistance and advice on various questions. I must also express my thanks to the authorities of the Foreign Office of the Netherlands for enabling me to print at the end of this volume the Table showing the present position with regard to the various Hague Conventions, and to Professor Jessup for having placed at my disposal the proof of the Supplement of 1940 of the valuable work entitled 'Neutrality Laws, Regulations, and Treaties' and edited by himself and Professor Deák.

I wish to thank Messrs. Longmans, Green & Co., and the printers, Messrs. T. & A. Constable, of Edinburgh, for their helpful co-operation.

H. LAUTERFACHT.

# ABBREVIATIONS

## OF TITLES OF BOOKS, ETC., QUOTED IN THE TEXT

THE books referred to in the bibliography and notes are, as a rule, quoted with their full titles and the date of their publication. Certain books, periodicals, and conventions which are very often referred to throughout this work are quoted in an abbreviated form, as follows :

- Acta Scandinavica* = *Acta Scandinavica Juris Gentium*.  
*A.J.* = *The American Journal of International Law*.  
*Alvarez, Grande* = *Alvarez, La grande guerre européenne et la neutralité du Chili* (1915).  
*Annuaire* = *Annuaire de l'Institut de droit international*.  
*Annual Digest* = *Annual Digest of Public International Law Cases*.  
*Ariga* = *Ariga, La guerre russo-japonaise* (1908).  
*A.S. Proceedings* = *Proceedings of the American Society of International Law*.  
*Balladore Pallieri* = *Balladore Pallieri, La guerra* (1935).  
*Barandon* = *Barandon, Le système juridique de la Société des Nations pour le prévention de la guerre. Translation from the German* (1933).  
*Barboux* = *Barboux, Jurisprudence du Conseil des Prises pendant la guerre de 1870-71* (1871).  
*Barclay, Problems* = *Barclay, Problems of International Practice and Diplomacy* (1907).  
*Baty* = *Baty, The Canons of International Law* (1930).  
*Bernsten* = *Bernsten, Das Seekriegsrecht* (1911).  
*Bluntschli* = *Bluntschli, Das moderne Völkerrecht der civilisirten Staaten*, 3rd ed. (1878).  
*Boeck* = *Boeck, De la propriété privée ennemie sous pavillon ennemi* (1882).  
*Boidin* = *Boidin, Les lois de la guerre et les deux conférences de la Haye* (1908).  
*Borchard* = *Borchard, The Diplomatic Protection of Citizens Abroad* (1915).

- Bordwell = Bordwell, *The Law of War between Belligerents* (1908).
- Bulmerincq = Bulmerincq, *Das Völkerrecht* (1887).
- B.Y. = *The British Year Book of International Law*.
- Calvo = Calvo, *Le droit international théorique et pratique*, 5th ed., 6 vols. (1896).
- Clunet = *Journal du droit international*.
- Colombos = Colombos, *A Treatise on the Law of Prize* (1926).
- Convention I. = Hague Convention for the Pacific Settlement of International Disputes.
- Convention II. = Hague Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.
- Convention III. = Hague Convention relative to the Opening of Hostilities.
- Convention IV. = Hague Convention concerning the Laws and Customs of War on Land.
- Convention V. = Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land.
- Convention VI. = Hague Convention relative to the Status of Enemy Merchant-ships at the Outbreak of Hostilities.
- Convention VII. = Hague Convention relative to the Conversion of Merchant-ships into Warships.
- Convention VIII. = Hague Convention relative to the Laying of Automatic Submarine Contact Mines.
- Convention IX. = Hague Convention respecting Bombardment by Naval Forces in Time of War.
- Convention X. = Hague Convention for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare.
- Convention XI. = Hague Convention relative to certain Restrictions on the Exercise of the Right of Capture in Maritime War.
- Convention XII. = Hague Convention relative to the Establishment of an International Prize Court.
- Convention XIII. = Hague Convention respecting the Rights and Duties of Neutral Powers in Naval War.
- Cruchaga = Cruchaga-Tocornal, *Nociones de Derecho Internacional*, 3rd ed., vol. i. (1923), vol. ii. (1925).

- Despagnet = Despagnet, Cours de droit international public, 4th ed. by de Boeck (1910).
- Deuxième Conférence, Actes = Deuxième conférence internationale de la paix, Actes et Documents, 3 vols. (1908-1909).
- Documents* = Documents on International Affairs (since 1928), edited by Wheeler-Bennett and Heald.
- Dupuis = Dupuis, Le droit de la guerre maritime d'après les doctrines anglaises contemporaines (1899).
- Dupuis, *Guerre* = Dupuis, Le droit de la guerre maritime d'après les conférences de la Haye et de Londres (1911).
- Entscheidungen* = Entscheidungen des Oberprisengerichts in Berlin. Herausgegeben im Auftrage des Reichs-Justizamtes. Berlin, 1918, 1921.
- Fauchille = Fauchille, Traité de droit international public, 8th ed. of Bonfils' Manuel de droit international public, vol. i. part 1 (1922), vol. i. part 2 (1925), vol. i. part 3 (1926), vol. ii. (1921).
- Fauchille, *Jur. all.* = Jurisprudence allemande en matière de prises maritimes. Décisions de la Cour Suprême de Berlin. Edited by Fauchille and Charles de Visscher (1924).
- Fauchille, *Jur. fr.* = Jurisprudence française en matière de prises maritimes. Edited by Fauchille (1916 *et seq.*).
- Fauchille, *Jur. ital.* = Jurisprudence italienne en matière de prises maritimes. Edited by Fauchille and Basdevant (1918).
- Fenwick = Fenwick, International Law, 2nd ed. (1934).
- Field = Field, Outlines of an International Code, 2 vols. (1872-1873).
- Fiore = Fiore, Nouveau droit international public, deuxième édition, traduite de l'italien et annotée par Antoine, 3 vols. (1885).
- Fiore, *Code* = Fiore, International Law Codified. Translation from the 5th Italian edition by Borchard (1918).
- Gareis = Gareis, Institutionen des Völkerrechts, 2nd ed. (1901).



- Garner = Garner, International Law and the World War (1920).
- Garner, *Developments* = Garner, Recent Developments in International Law (1925).
- Garner, *Prize Law* = Garner, Prize Law during the World War (1927).
- Gemma = Gemma, Appunti di diritto internazionale (1923).
- Genet = Genet, Précis de droit maritime pour le temps de guerre, 2 vols. (? 1936, 1938).
- Gessner = Gessner, Le droit des neutres sur mer (1865).
- Grotius = Grotius, De Jure Belli ac Pacis (1625).
- Grotius, Annuaire* = Grotius Annuaire International.
- Grotius Society* = Transactions of the Grotius Society.
- Hague Recueil* = Recueil des cours, Académie de Droit International de la Haye.
- Hague Regulations = Hague Regulations respecting the Laws and Customs of War on Land, adopted by the Hague Peace Conference of 1907.
- Hall = Hall, A Treatise on International Law, 8th ed. (1924) by A. Pearce Higgins.
- Halleck = Halleck, International Law, 4th English ed. by Sir Sherston Baker, 2 vols. (1908).
- Hartmann = Hartmann, Institutionen des praktischen Völkerrechts in Friedenszeiten (1874).
- Harvard Research* (1939) = Rights and Duties of Neutral States in Naval and Aerial War. Rights and Duties of States in case of Aggression. Draft Conventions, with Comment, Prepared by the Research in International Law of the Harvard Law School.
- Hatschek = Hatschek, Völkerrecht als System rechtlich bedeutsamer Staatsakte (1923).
- Hautefeuille = Hautefeuille, Des droits et des devoirs des nations neutres en temps de guerre maritime, 2nd ed., 3 vols. (1858).
- Heffter = Heffter, Das europäische Völkerrecht der Gegenwart, 8th ed. by Gefcken (1888).
- Heilborn, *Rechte* = Heilborn, Rechte und Pflichten der neutralen Staaten (1888).
- Heilborn, *System* = Heilborn, Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen (1896).

- Hershey = Hershey, *The Essentials of International Public Law and Organisation*, 2nd revised ed. (1927).
- Higgins = Higgins, *The Hague Peace Conferences* (1909).
- Hoijer = Hoijer, *La solution pacifique des litiges internationaux* (1925).
- Holland, *Lectures* = Holland, *Lectures on International Law*. Edited by T. A. Walker and W. L. Walker (1933).
- Holland, *Prize Law* = Holland, *A Manual of Naval Prize Law* (1888).
- Holland, *Studies* = Holland, *Studies in International Law* (1898).
- Holland, *War* = Holland, *The Laws of War on Land* (1908).
- Holtzendorff = Holtzendorff, *Handbuch des Völkerrechts*, 4 vols. (1885-1889).
- Hudson, *Cases* = Hudson, *Cases and Other Materials on International Law*, 2nd ed. (1936).
- Hudson, *Legislation* = Hudson, *International Legislation*, vols. i.-vi. (covering the years 1919-1934) (1931-1937).
- Hudson, *Permanent Court* = Hudson, *The Permanent Court of International Justice. A Treatise* (1934).
- Hurst = Hurst and Bray, *Russian and Japanese Prize Cases*, vol. i. (1912), vol. ii. (1913).
- Hyde = Hyde, *International Law chiefly as interpreted and applied by the United States*, 2 vols. (1922).
- Keith's Wheaton = Wheaton's *Elements of International Law*, sixth English ed. by A. Berriedale Keith, 2 vols. (1929).
- Kleen = Kleen, *Lois et usages de la neutralité*, 2 vols. (1900).
- Klüber = Klüber, *Europäisches Völkerrecht*, 2nd ed. by Morstadt (1851).
- Kohler = Kohler, *Grundlagen des Völkerrechts* (1918).
- Kriegsbrauch* = *Kriegsbrauch im Landkriege* (1902).
- Kunz = Kunz, *Kriegsrecht und Neutralitätsrecht* (1935).
- Land Warfare = Edmonds and Oppenheim, *Land Warfare. An Exposition of the Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army* (1912).

- Lawrence = Lawrence, The Principles of International Law, 7th ed. revised by P. H. Winfield (1923).
- Lawrence, *Essays* = Lawrence, Essays on some Disputed Questions of Modern International Law (1884).
- Lawrence, *War* = Lawrence, War and Neutrality in the Far East, 2nd ed. (1904).
- Lémonon = Lémonon, La seconde conférence de la paix (1908).
- Liszt = Liszt, Das Völkerrecht, 12th ed. by Fleischmann (1925).
- Ll. R. = Lloyd's Reports of Prize Cases (1914-1924), by Aspinall and De Hart.
- L.N.T.S.* = League of Nations Treaty Series. Publication of Treaties and International Engagements registered with the Secretariat of the League.
- Longuet = Longuet, Le droit actuel de la guerre terrestre (1901).
- Lorimer = Lorimer, The Institutes of International Law, 2 vols. (1883-1884).
- De Louter = De Louter, Le droit international public positif, 2 vols., French translation of the Dutch original, 2 vols. (1920).
- Maine = Maine, International Law, 2nd ed. (1894).
- Manning = Manning, Commentaries on the Law of Nations, new ed. by Sheldon Amos (1875).
- Martens = Martens, Völkerrecht, German translation of the Russian original, 2 vols. (1883).
- Martens, G. F. = G. F. Martens, Précis du Droit des Gens moderne de l'Europe, nouvelle éd. par Vergé, 2 vols. (1858).
- . Martens, R.  
 Martens, N.R.  
 Martens, N.S.  
 Martens, N.R.G.  
 Martens, N.R.G. 2nd ser.  
 Martens, N.R.G. 3rd ser.  
 Martens, *Causes célèbres*  
 Mérignhac
- These are the abbreviated quotations of the different parts of Martens, *Recueil de Traités*, which are in common use.
- = Martens, *Causes célèbres du droit des gens*, 2nd ed., 5 vols. (1858-1861).
- = Mérignhac, *Traité de droit public international*, vol. i. (1906), vol. ii. (1907), vol. iii<sup>a</sup>. (1912).

- Mérignhac-Lémonon = Mérignhac et Lémonon, *Le droit des gens et la guerre de 1914-1918*, 2 vols. (1921).
- Meurer = Meurer, *Die Haager Friedenskonferenz*, 2 vols. (1905-1907).
- Moore = Moore, *A Digest of International Law*, 8 vols., Washington (1906).
- Moore, *Arbitrations* = Moore, *History and Digest of the Arbitrations to which the United States have been a Party*, 6 vols. (1898).
- Moore, *Current Illusions* = Moore, *International Law and Some Current Illusions, and other Essays* (1924).
- Nippold = Nippold, *Die zweite Haager Friedenskonferenz*, 2 vols. (1908-1911).
- Nys = Nys, *Le droit international*, 3 vols., 2nd ed. (1912).
- Off. J.* = Official Journal of the League of Nations.
- Ortolan = Ortolan, *Règles internationales et diplomatique de la mer*, 2 vols., 3rd ed. (1856).
- Perels = Perels, *Das internationale öffentliche Seerecht der Gegenwart*, 2nd ed. (1903).
- Phillimore = Phillimore, *Commentaries upon International Law*, 4 vols., 3rd ed. (1879-1888).
- Piedelièvre = Piedelièvre, *Précis de droit international public*, 2 vols. (1883-1895).
- Pillet = Pillet, *Les lois actuelles de la guerre* (1901).
- Pistoye et Duverdy = Pistoye et Duverdy, *Traité des prises maritimes*, 2 vols. (1854-1859).
- Pradier-Fodéré = Pradier-Fodéré, *Traité de droit international public*, 8 vols. (1885-1906).
- Pufendorf = Pufendorf, *De Jure Naturae et Gentium* (1672).
- Reddie, *Researches* = Reddie, *Researches, Historical and Critical, in Maritime International Law*, 2 vols. (1844).
- R.G.* = *Revue générale de droit international public*.
- R.G.D.A.* = *Revue générale de droit aérien*.
- R.I.* = *Revue de droit international et de législation comparée*.
- R.I. (Geneva)* = *Revue de droit international, de sciences diplomatiques, politiques et sociales*.
- R.I. (Paris)* = *Revue de droit international*.



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# **PART I**

## **SETTLEMENT OF STATE DIFFERENCES**



# CHAPTER I

## AMICABLE SETTLEMENT OF STATE DIFFERENCES

### I

#### STATE DIFFERENCES AND THEIR AMICABLE SETTLEMENT IN GENERAL

Hershey, No. 304—Ullmann, §§ 148-150—Bulmerincq in *Holtzendorff*, iv. pp. 5-12—Heffter, §§ 105-107—Rivier, ii. § 57—Fauchille, §§ 930-930 (1)—Despagnet, No. 469—Pradier-Fodéré, vi. Nos. 2580-2583—Calvo, iii. §§ 1670-1671—Fiore, ii. Nos. 1192-1198, and *Code*, No. 1251—De Louter, ii. pp. 101-109—Hyde, ii. §§ 552-585—Fenwick, pp. 399-419—Lauterpacht, *The Function of Law*, *passim*—Wagner, *Zur Lehre von den Streiterledigungsmitteln des Völkerrechts* (1900)—*Annuaire*, xxix. (1922) pp. 23-58, and pp. 258, 259—T. W. Balch, *Legal and Political Questions between Nations* (1924)—Cereti, *La tutela giuridica degli interessi internazionali* (1929)—Dotremont, *L'arbitrage international et le Conseil de la Société des Nations* (1929), pp. 293-336—Morgenthau, *La notion du 'politique' et la théorie des différends internationaux* (1933)—Blühdorn, *Einführung in das angewandte Völkerrecht* (1934), pp. 186-243—Gihl, *International Legislation* (1937), pp. 77-146—Schindler, *Die Schiedsgerichtsbarkeit seit 1914* (1938), pp. 55-121—Verzijl in *R.I.*, 3rd ser., vi. (1925) pp. 732-759—Ch. de Visscher, *ibid.*, ix. (1928) pp. 68-87—Fischer Williams in *International Affairs*, vii. (1928) pp. 94-120—Decencière-Ferrandière in *R.G.*, xxxvi. (1929) pp. 416-451, and xli. (1934) pp. 148-178—Brierly in *Problems of Peace*, iii. (1929) pp. 278-298, and iv. (1930) pp. 39-59—the same in *Journal of the British Institute of International Affairs* (1925), pp. 227-241, in *Cornell Law Quarterly*, xiii. (1928) pp. 397 *et seq.*, and in *Virginia Law Review* (1930), pp. 537-545—Guggenheim in *Z.ö.R.*, xi. (1931) pp. 555-578—Salvioli in *Hague Recueil*, 1933 (iv.), pp. 133-139—Kelsen in *Z.ö.R.*, xii. (1932) pp. 571-608, and in *R.I.*, 3rd ser., xv. (1934) pp. 5-24. Bruns in *Z.ö.V.*, ix. (1939) pp. 627-645. And see bibliography on p. 5 (n.).

§ 1. International differences can arise from a variety of Legal and Political grounds. They are generally divided into legal and political. Legal differences are those in which the parties to the dispute base their respective claims and contentions on grounds recognised by International Law. All other controversies are usually referred to as political or as conflicts of Interest.

of interests. This distinction is, for some purposes,<sup>1</sup> theoretically correct and of practical importance. But it is controversial whether it can properly be resorted to in

<sup>1</sup> The distinction between legal and political disputes is usually referred to also as the distinction between justiciable and non-justiciable disputes, or between disputes as to rights and conflicts of interests. It has now become part of positive International Law as embodied in various instruments of pacific settlement. It formed part of the great number of arbitration treaties concluded before the World War and incorporating the formula of the Arbitration Treaty of 1903 between Great Britain and France, in which it was agreed to submit to arbitration disputes of a 'legal nature or relating to the interpretation of treaties' (see below, § 17). It is now embodied, at least in form, in the Optional Clause of Article 36 of the Statute of the Court (see below, § 25*ae*), in the General Act for the Pacific Settlement of International Disputes (see below, § 25*aj*), and in most other treaties of pacific settlement. For a survey of these treaties see Lauterpacht, *The Function of Law*, pp. 29-42.

The distinction between the two principal categories of disputes can be and has been understood in at least three meanings: (1) It may be based on the view that some disputes are political or non-justiciable because owing to the defective development of International Law they cannot be decided by existing rules of law; (2) it may be grounded in the opinion that certain disputes are 'political' inasmuch as they affect so vitally the independence and sovereignty of States as to render unsuitable a decision based exclusively on legal considerations; (3) it may have reference to the attitude of the party putting forward a claim or a defence. According to the last test only those disputes are 'legal' in which the parties admittedly base their claim or defence on existing law, while disputes which are admittedly concerned with a claim for change in the law are disputes as to 'conflicts of interests,' and as such political and non-justiciable. It is clear that a dispute which is 'legal' or 'justiciable' by virtue of

one test may be 'political' by reference to any of the other tests.

There is a growing disposition to admit that the first of these tests is unscientific; that it is contrary to the fundamental legal principle which forbids the judge to refuse to give a decision on the ground of alleged absence of law; that it is not in keeping with the practically unlimited terms of Article 38 of the Statute of the Permanent Court of International Justice (see below, § 25*ae*); and that it is refuted by the experience of international judicial settlement, which shows no instance of refusal of adjudication on the ground that there were no legal rules available. Similarly, the test based on the relative importance of the controversy, even when coupled with the conferment upon the tribunal of the power to determine whether a dispute is 'important,' is now increasingly considered as unsuitable for determining the obligation of judicial settlement in any particular case. The third, which is purely subjective and regards the attitude of the parties as the decisive factor, has a great number of adherents and finds support in the language of the General Act and of numerous other instruments.

It cannot be denied that the relations of States show situations in which States openly or impliedly demand a change in the existing law, and that international society ought to provide for more effective means than exist at present to cope with conflicts of this description. But the test based on the possibility of such claims being put forward cannot be used as a basis of the distinction between 'justiciable' and 'non-justiciable' disputes in instruments providing for obligatory settlement without largely destroying the object which they are believed to pursue. The adoption of that test would mean, *inter alia*, that in each case of a controversy as to whether a dispute is covered by the undertaking of obligatory judicial settlement, the opinion of the interested party, and not the content of the treaty, would be decisive for

treaties of obligatory pacific settlement for the purpose of determining which disputes are and which are not included in the obligation of submission to binding judicial or arbitral procedure.

§ 2. Claims for the change of existing law cannot usefully be the object of a binding decision by virtue of an obligation undertaken in advance. But the methods of dealing with disputes of this nature may be the subject of obligations

International Law not exclusively concerned with Legal Differences.

answering the question whether the obligation of the treaty applies to the particular dispute. This would mean in fact a denial of the duty of obligatory judicial settlement.

Although the distinction, in treaties of obligatory judicial settlement, between disputes which are and disputes which are not covered by that duty, is firmly embedded in existing treaties, that fact is by no means decisive for the appreciation of the juridical value of the traditional distinction as part of instruments providing for obligatory settlement of disputes. The various forms of the distinction between legal and political (or justiciable and non-justiciable) disputes may be of interest for the student of the political and historical aspects of international relations; they may be useful in drawing attention to the necessity of providing means for adjusting International Law to changes in international conditions; and they may be of value for intimating to statesmen and writers which disputes ought, by specific reservations, to be exempted from the purview of the duty of obligatory judicial settlement. The object which that distinction cannot possibly fulfil is to provide a test of whether a particular dispute is in an existing treaty covered by the duty of obligatory judicial settlement. This means that the distinction in question cannot with any degree of usefulness form part of treaties of obligatory judicial settlement. On the other hand, its effect has been to introduce an element of disintegration into the obligation which these instruments profess to contain.

It will be noted that, as shown by a number of treaties (see below, § 25a), the securing of the procedure of conciliation is in no way dependent upon

the adoption of the traditional distinction.

In addition to the literature at the beginning of § 1, the following selection is submitted from the vast literature on the subject: Lorimer in Balch's *International Courts of Arbitration* (1874), pp. 28-38; Westlake, i. pp. 350-368; Hyde, ii. §§ 560-561; Barandon, pp. 202-207; Lammasch, *Rechtskraft internationaler Schiedssprüche* (1913), pp. 43-49; Strisower, *Der Krieg und die Völkerrechtsordnung* (1919), pp. 56-68; Brown, *International Society* (1923), chap. vii., and in *A.J.*, xv. (1922) pp. 254-259; Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929), pp. 34-57; the same, *International Change and International Peace* (1932), and in *A.J.*, xv. (1932) pp. 31-36; Lauterpacht in *Hague Recueil*, 1930 (iv.), pp. 499-653, and in *B.Y.*, 1930, pp. 134-157; Morgenthau, *Die internationale Rechtspflege* (1929), pp. 37-98; Schindler in *Hague Recueil*, 1928 (v.), pp. 264-279, 1933 (iv.), p. 280-286, and the same, *Die Schiedsgerichtsbarkeit seit 1914* (1938), pp. 62-118; Guggenheim, *The World Crisis* (Geneva Institute of International Studies, 1938), pp. 200-226; *A.S. Proceedings*, 1916, pp. 78-95; 1924, pp. 44-83; *Annuaire*, xxix. (1922) pp. 23-58, 258, 259; xxxiii. (2) (1927) pp. 689-833; xxxv. (1) (1929) pp. 467-498, and xxxv. (2) (1929) pp. 170-183; Castberg in *R.I.*, 3rd ser., vi. (1925) pp. 155-166; Mulder, *ibid.*, vii. (1926) pp. 555-576; Hostie, *ibid.*, ix. (1928) pp. 265-281; Brunsin *Z.&V.*, i. (1929) pp. 26-31; Whitton and Brewer in *A.J.*, xxv. (1931) pp. 445-458; Rundstein in *R.I.*, 3rd ser., xv. (1934) pp. 377-415; Gihl in *Acta Scandinavica*, viii. (1937) pp. 67-107.

undertaken in treaties of pacific settlement or in general instruments providing for remedial or legislative action of the organs of the international community. As such they properly fall within the purview of International Law.

Amicable  
in contra-  
distinc-  
tion to  
Compul-  
sive Set-  
tlement of  
Differ-  
ences.

§ 3. Political and legal differences can be settled either by amicable or by compulsive means. Before the establishment of the League of Nations there were four kinds of amicable means—namely, negotiation between the parties, good offices of third parties, mediation, and arbitration. And there were four kinds of compulsive means—namely, retorsion, reprisals, blockade, and intervention of third States. No State is entitled to make use of compulsive means before negotiation has been tried, but there is (apart from the Covenant of the League of Nations or some other international obligation) no legal duty to have recourse to good offices or mediation of third States, or arbitration.<sup>1</sup> However, already before the World War, States frequently bound themselves to submit disputes to binding arbitral settlement. They did so either in general arbitration treaties or through the so-called Compromise Clause,<sup>2</sup> which stipulates that any differences arising between them with regard to matters regulated by the treaties concerned, or their interpretation, shall be settled through arbitration. After the World War, the Powers, anxious 'to achieve international peace and security by the acceptance of obligations not to resort to war,' adopted in the Covenant of the League of Nations three new means of settling international disputes. They were: inquiry and report by the Council of the League, inquiry and report by the Assembly, and a judgment of the Permanent International Court of Justice.<sup>3</sup> Moreover, the members of the League have undertaken that they will not go to war without attempting to reach a settlement in the manner laid down by the Covenant. Most States have now undertaken wide obligations in the sphere of compulsory judicial settlement.

<sup>1</sup> Except in the case of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. See Hague Convention II.,

above, vol. i. § 135; and below, § 19.

<sup>2</sup> See above, vol. i. § 553.

<sup>3</sup> See below, §§ 25ab-25ag.

The majority of them are bound by the obligations of the so-called Optional Clause of the Statute of the Permanent Court of International Justice<sup>1</sup> and even more comprehensive commitments.<sup>2</sup> But these instruments do not substantially affect the rule, expressly affirmed by the Permanent Court,<sup>3</sup> that no universal international legal duty as yet exists for States to settle their differences through arbitration or judicial process.<sup>4</sup>—



## NEGOTIATION

Twiss, ii. § 4—Lawrence, § 220—Moore, vii. § 1064—Taylor, §§ 359-360—Heffter, § 107—Bulmerincq in *Holtzendorff*, iv. pp. 13-17—Ullmann, § 151—Fauchille, §§ 931-932—Despagnet, Nos. 470 and 477—Pradier-Fodéré, vi. Nos. 2584-2587—Rivier, ii. § 57—Calvo, iii. §§ 1672-1680—Martens, ii. § 103—Nys, ii. pp. 539-542—Hyde, ii. § 552—Rolin, §§ 54-56—Hoijer, pp. 2-25—Fenwick, pp. 405, 406—Stowell, pp. 391-400—Kaasik in *R.I.*, 3rd ser., xiv. (1933) pp. 89-95.

§ 4. The simplest means of settling State differences, and that to which States as a rule resort before they make use of other means, is negotiation. Indeed, the great majority of treaties of pacific settlement recognise it as the first step towards the settlement of international disputes. It consists in such acts of intercourse between the parties as are initiated and directed for the purpose of effecting an understanding, and thereby amicably settling the difference that has arisen between them.<sup>5</sup> Thus, for instance, a conference of diplomatic representatives,<sup>6</sup> or even of the heads of the

In what  
Negotia-  
tion con-  
sists.

<sup>1</sup> See below, § 25ae.

<sup>2</sup> See below, § 25aj.

<sup>3</sup> See below, § 12; and see Series A, No. 2, p. 16.

<sup>4</sup> See on compulsive settlement as between members of the League, below, § 52a.

<sup>5</sup> See above, vol. i. §§ 477-482, where the international transaction of negotiation in general is discussed. Note also the *Mavrommatis Palestine Concessions* case, P.C.I.J., Series A, No. 2, pp. 13-15 and 61-65, and Judge Moore's definition of negotiation at pp. 62-63. And see Feinberg, *La*

*juridiction de la Cour Permanente de Justice Internationale dans le système des Mandats* (1930), pp. 114-121. Most treaties make a failure to settle a dispute by negotiation a condition precedent to arbitration or judicial settlement. The Permanent Court has, however, rejected the view that the requirements of negotiations must be regarded as implied in all clauses conferring jurisdiction upon it: P.C.I.J., Series A, No. 6 (Germany v. Poland), p. 14. See also Series C, No. 9 (i.), pp. 32, 60, 74.

<sup>6</sup> See Stowell, pp. 397-400.



States at variance, may be arranged, for the purpose of discussing the differences and preparing the basis for an understanding. The existence of the League of Nations with numerous periodical or specially convened meetings of its organs provides a convenient means for such discussion. —

Ascertain-  
ment of  
Facts.

§ 5. One of the commonest obstacles preventing the successful settlement of a dispute by means of negotiation is the difficulty of ascertaining the precise facts which have given rise to the dispute. Herein lies the value of bodies such as the International Commissions of Inquiry under Hague Convention I., or the Permanent Commissions of Inquiry under the so-called Bryan 'cooling-off' Treaties. It is convenient to deal with these Commissions of Inquiry in Section IV., devoted to Conciliation.

Effect of  
Negotia-  
tion.

§ 6. The effect of negotiation may be to make it apparent that the parties cannot come to an amicable understanding at all. But frequently the effect is that one of the parties acknowledges the claims of the other party. Again, on occasions, negotiation results in a party, although it does not acknowledge its opponent's alleged rights, waiving its own rights for the sake of peace. And, lastly, the effect of negotiation may be a compromise.<sup>1</sup>

Consulta-  
tion.

§ 6a. A number of treaties provide for consultation among the contracting parties. Thus in Article VII. of the Nine-Power Treaty of February 6, 1922, concerning China, the parties agreed that 'whenever a situation arises which in the opinion of any one of them involves the application of the stipulations of the present Treaty, and renders desirable discussion of such application, there shall be full and frank communication between the Contracting Parties concerned.'<sup>2</sup> Similar provisions for consultation, although not altogether unknown before the World War,<sup>3</sup> became more

<sup>1</sup> See Hill, *The Public International Conference* (1929), pp. 206-218, 222.

<sup>2</sup> Hudson, *Legislation*, ii. p. 827. In reliance on that Article Belgium convened in October 1937 the Brussels Conference to deal with the situation resulting from the invasion of China by Japan. The latter,

although a signatory to the Treaty, refused to attend. See *Documents*, 1937, p. 703. And see *ibid.*, pp. 709-756, for the documents relating to the Brussels Conference.

<sup>3</sup> For some examples see Kunz in *Friedenswarte*, 39 (1939), p. 22.

frequent in the period preceding the war with Germany in 1939.<sup>1</sup> Their legal effect is not clear. These undertakings occasionally refer to consultation as a means of framing a common policy or attitude irrespective of any existing controversy between the parties. In so far as they are intended to facilitate the settlement of disputes between them, the legal effect of such provisions is indistinguishable from that resulting from the obligation to enter into negotiations. In general, it seems doubtful whether, having regard to their wording, provisions as to consultation are calculated to create rights and duties which are, in law, capable of influencing conduct.<sup>2</sup>

### III

#### GOOD OFFICES AND MEDIATION

Phillimore, iii. §§ 3-5—Twiss, ii. § 7—Lawrence, § 220—Moore, vii. §§ 1065-1068—Hershey, Nos. 306-308—Taylor, §§ 359-360—Bluntschli, §§ 483-487—Heffter, §§ 107-108—Bulmerincq in *Holtzendorff*, iv. pp. 17-30—Ullmann, §§ 152-153—Fauchille, §§ 932 (1)-943—Despagnet, Nos. 471-476—Pradier-Fodéré, vi. Nos. 2588-2593—Mérignhac, i. pp. 429-447—Rivier, ii. § 58—Nys, ii. pp. 543-546—Calvo, iii. §§ 1682-1705—Fiore, ii. Nos. 1199-1201, and *Code*, Nos. 1253-1267—Martens, ii. § 103—Hoiyer, pp. 25-79—Cruchaga, §§ 669-686—Rolin, §§ 57-60—Hyde, ii. §§ 553-556—Fenwick, pp. 400-403—Stowell, pp. 604-609—Keith's *Wheaton*, pp. 551-554—Holls, *The Peace Conference at The Hague* (1900), pp. 176-203—Zamfiresco, *De la médiation* (1911)—Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit* (1914), pp. 11-23—Melville, *Vermittlung und gute Dienste* (1920)—Schücking, *Das völkerrechtliche Institut der Vermittlung* (1923), pp. 1-53—*Politis in R.G.*, xvii. (1910) pp. 136-163—Sibert, *ibid.*, xl. (1933) pp. 666-668. See also the literature referred to at the beginning of § 11a.

§ 7. When parties are not inclined to settle their differences by negotiation, or when they have negotiated without

Occasions  
for Good  
Offices  
and Medi-  
ation.

<sup>1</sup> For instance, in the Pan-American Conventions referred to below, p. 15; in Article 2 of the Pact of the Balkan Entente of February 1934 (Hudson, *Legislation*, vi. p. 635); and in the ill-fated Anglo-German Declaration of Munich of September 30, 1938, in which the representatives of the two countries 'resolved that the method of consultation shall be

the method adopted to deal with any other questions [i.e. in addition to the Czecho-Slovak settlement] that may concern our two countries.' See Schindler, *Die Schiedsgerichtsbarkeit seit 1914* (1938), pp. 201-204.

<sup>2</sup> For a symposium on Consultation see *Friedenswart*, 39 (1939), pp. 1-52. See also Antelo, *La tecnica consultativa en el Derecho Gentes* (1938).

effecting an understanding, a third State<sup>1</sup> may be able to procure a settlement through its good offices or its mediation. Such assistance may have been asked for by one or both of the parties at variance, or it may have been spontaneously offered. Collective mediation is also possible, several States<sup>2</sup> acting at the same time as mediators. Thus the protracted war between Bolivia and Paraguay was brought to a conclusion largely owing to the joint mediation of Argentina, Brazil, Chile, the United States, Peru and Uruguay between 1935 and 1937.<sup>3</sup>—

Right and  
Duty of  
offering,  
request-  
ing, and  
rendering  
Good  
Offices  
and Medi-  
ation.

§ 8. As a rule, a third State has no duty to offer its good offices or mediation, or to respond to a request from conflicting States for this service, nor is it, as a rule, the duty of conflicting parties themselves to ask or to accept a third State's good offices and mediation. But by special treaty such a duty may be created.<sup>4</sup> Articles 11 and 15 of the Covenant of the League<sup>5</sup> constitute a treaty obligation of this nature.—

Good  
Offices in  
contradis-  
tinction  
to Media-  
tion.

§ 9. A theoretical distinction exists between good offices and mediation. The difference between them is that, whereas *good offices* consist in various kinds of action tending to call negotiations between the conflicting States into existence, *mediation* consists in direct conduct of negotiations between the parties at issue on the basis of proposals made by the mediator. However, diplomatic practice and treaties do not always distinguish between good offices and mediation.

Good  
Offices  
and Medi-  
ation  
according  
to the  
Hague Ar-  
bitration  
Conven-  
tion.

§ 10. The Hague Convention for the Pacific Settlement of International Disputes<sup>6</sup> endeavoured (in Articles 2-8)

<sup>1</sup> Or, it may be added, a citizen thereof. Thus the Inter-American Treaty on Good Offices and Mediation, signed on December 23, 1936, provided that when a controversy cannot be settled by ordinary diplomatic means the parties may have recourse to the good offices and mediation of an eminent citizen of another American country, preferably chosen from a list prepared in accordance with the provisions of the Treaty: *Documents*, 1936, p. 586.

<sup>2</sup> Or the League of Nations, see below, §§ 256-259.

<sup>3</sup> For details see Toynbee, *Survey*, 1936, pp. 847-872, and *Documents*, 1936, pp. 538-554. As to the part played by the League see below, p. 88.

<sup>4</sup> See, e.g., Article 8 of the Peace Treaty of Paris of March 30, 1856, between Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey. See also § 10, below, as to the Hague Convention.

<sup>5</sup> See below, §§ 256-259.

<sup>6</sup> See Meurer, i. pp. 104-129; Lémonon, pp. 69-73; Wehberg, *Kommentar*, pp. 10-21; Scott, *Conferences*, pp. 256-265.

to induce the signatory Powers to have recourse more frequently than heretofore to good offices and mediation.

(1) These Articles made it clear that States which are strangers to a dispute had a right to offer good offices or mediation, and that the exercise of this right must not be regarded as an unfriendly act. (2) Good offices and mediation had exclusively the character of advice, and never had binding force (Article 6). (3) The acceptance of mediation was not (Article 7) to have the effect of interrupting, delaying, or hindering mobilisation or other preparatory measures for war, or of interrupting military operations when war has broken out before the acceptance of mediation, unless there should be an agreement to the contrary.<sup>1</sup>

§ 11. The value of good offices and mediation for the amicable settlement of international conflicts, be it before or after the parties have appealed to arms, cannot be overestimated. The Hague Convention greatly enhanced the value of such assistance by giving third States a legal right to tender it.<sup>2</sup> The Dogger Bank incident of 1904 may be quoted as a case in which probable war was averted in this way, for it was through the mediation of France that Great Britain and Russia agreed upon the establishment of an International Commission of Inquiry.<sup>3</sup> The good offices of the President of the United States of America were the means of bringing a war to an end by inducing Russia and Japan, in August 1905, to open the negotiations which led to the conclusion of the Peace of Portsmouth on September 5, 1905. Nowadays the importance of these means of settlement of international differences is even greater than in the past. The outbreak of war is in the circumstances and conditions of our times no longer a matter of indifference to all except the belligerent States. After the World War, this truth found expression in the Covenant of the League

<sup>1</sup> These provisions of the Hague Convention have not been superseded by subsequent and wider undertakings. Thus the Far Eastern Advisory Committee constituted by the League in connection with the dispute between China and Japan held in 1937 that there were applicable to the

dispute, among others, the various provisions of Hague Convention No. I.: *Documents*, 1937, p. 692.

<sup>2</sup> See the important cases of mediation discussed by Calvo, iii. §§ 1634-1700, and Fauchille, §§ 936-942 (10).

<sup>3</sup> See below, § 11b (n.).

of Nations, which has devised new means for settling international disputes, and which, in Article 11, has conferred upon every member of the League the right to initiate collective mediation by the League as a whole.<sup>1</sup>

## IV

## CONCILIATION

Fauchille, §§ 970 (6)-970 (16), 970 (54)-970 (55)—Suarez, §§ 329-330—Liszt, § 52—Schücking und Wehberg, pp. 505-507—Barandon, pp. 143-153, 167-171, 177-183—Hudson, *Permanent Court*, pp. 30-34—Lauterpacht, *The Function of Law*, pp. 260-269—Hoijer, pp. 79-100—Hyde, ii. §§ 557-558—Garner, *Developments*, pp. 526-588—Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 196-203—Bryce, *International Relations* (1922), pp. 226-234—Schücking, *Das völkerrechtliche Institut der Vermittlung* (1923)—Brown, *La conciliation internationale* (1925)—Le Gouz de Saint-Seine, *La conciliation internationale* (1930)—Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (1931), pp. 1001-1034—Hill, *International Commissions of Inquiry and Conciliation* (International Conciliation Pamphlet No. 278, March 1932)—Vulcan, *La conciliation dans le droit international actuel* (1932)—Efremoff, *Les traités internationaux de conciliation*, 3 vols. (1932)—the same in *Z.V.*, xv. (1930) pp. 368-386, in *Hague Recueil*, 1927 (iii.), pp. 5-147, *ibid.*, 59 (1937) (i.), pp. 103-212, and in *R.I.*, 3rd ser., vi. (1925) pp. 876-895—Schindler, *Die Schiedsgerichtsbarkeit seit 1914* (1938), pp. 176-195, and in *R.I.*, 3rd ser., vi. (1925) pp. 816-875—Gorgé, *ibid.*, vii. (1926) pp. 633-676, and viii. (1927) pp. 58-106—Rostworowski in *Annuaire*, xxxiii. (2) (1927) pp. 835-874—Makowski in *R.G.*, xxxiv. (1927) pp. 273-308—Ch. de Visscher in *R.I.*, 3rd ser., vii. (1928) pp. 33-81, 243-262—Ruegger, *ibid.*, x. (1929) pp. 91-108—Hyde in *B.Y.*, 1929, pp. 96-110, and in *A.S. Proceedings* (1929), pp. 144-157—Revel in *R.G.*, xxxviii. (1931) pp. 564-607—Bellquist in *A.J.*, xxvi. (1932) pp. 70-86—Montagne in *R.I. (Paris)*, 22 (1938), pp. 50-104. And see the literature at the beginning of § 25ah.

§ 11a. Conciliation is the process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts and (usually after hearing the parties and endeavouring to bring them to an agreement) to make a report containing proposals for a settlement, but not having the binding character of an award or judgment.

Historically, conciliation may be regarded as a development out of the International Commissions of Inquiry and the Permanent Commissions of the so-called Bryan 'cooling-

<sup>1</sup> See below, §§ 25b-25g.

off' treaties, which we are about to discuss. Conciliation stands half-way between, on the one hand, the process of reference to one of these Commissions, and, on the other, the processes of arbitration and judicial settlement, which we shall discuss later. It differs from Commissions of Inquiry in that their main object is the elucidation of the facts, in the hope that, once that difficulty has been overcome, the parties will of their own accord be able to settle the dispute; whereas the main object of conciliation is to enlist the active services of a commission of persons in bringing the parties to an agreement. It differs from arbitration and judicial settlement in that under conciliation the parties are under no legal obligation to adopt the proposals for a settlement which are suggested to them; whereas a legal obligation exists to comply with the award or judgment of a duly constituted tribunal.

It is also desirable to distinguish conciliation from mediation by confining the term 'mediation' to cases where a third State endeavours to bring the parties together by conducting negotiations between them, and the term 'conciliation' to cases where the parties have referred the dispute to a body of persons primarily for the purpose of an impartial ascertainment of the facts and a suggestion of the appropriate lines of a settlement.

§ 11b. The contracting Powers of the Hague Convention for the Pacific Settlement of International Disputes recommended (Article 9 of that Convention) that in the case of disputes arising out of differences of opinion on points of fact and involving neither honour nor vital interests, which the parties could not settle by diplomatic negotiation, they should, so far as circumstances allowed, institute an International Commission of Inquiry<sup>1</sup> to elucidate the facts underlying the difference by an impartial and conscientious investigation. The Convention of 1899 had only six articles

<sup>1</sup> See Herr, *Die Untersuchungskommissionen der Haager Friedenskonferenzen* (1911); Meurer, i. pp. 129-166; Higgins, pp. 167-170; Lémonon, pp. 73-94; Wehberg, *Kommentar*, pp. 21-46; Nippold, i. pp. 23-35;

Scott, *Conferences*, pp. 265-273; Politis in *R.G.*, xix. (1912) pp. 149-188; Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit* (1914), pp. 224-239; Hudson, *Permanent Court*, pp. 30-34.

(9-14) on the subject. The Second Conference of 1907, profiting by the experience gained by the Commission of Inquiry in the Dogger Bank<sup>1</sup> case, the first occasion on which a Commission of Inquiry was set up, remodelled the institution.<sup>2</sup> The duty of the Commission is to investigate the circumstances of the case, and issue a report 'limited to a statement of facts' and having in no way 'the character of an award'; the parties are free as to the effect to be given to it. These stipulations are still in force as between the parties to Hague Convention I., and have also been used as a model in drafting some of the recent conciliation treaties which we discuss below.

Bryan  
Perma-  
nent Com-  
missions  
of In-  
quiry.

§ 11c. Different from these International Commissions, but inspired by the idea underlying them, are the Permanent Commissions of Inquiry constituted for differences

<sup>1</sup> On October 21, 1904, during the Russo-Japanese War, the Russian Baltic fleet, which was on its way to the Far East, fired into the Hull fishing fleet off the Dogger Bank in the North Sea, whereby two fishermen were killed and considerable damage was done to several trawlers. Great Britain demanded from Russia, not only an apology and ample damages, but also severe punishment of the officer responsible for the outrage. As Russia maintained that the firing was caused by the approach of some Japanese torpedo-boats, and that she could therefore not punish the officer in command, the parties agreed upon the establishment of an International Commission of Inquiry. This commission was charged, not only to ascertain the facts of the incident, but also to pronounce an opinion concerning the responsibility for the incident, and the degree of blame attaching to the responsible persons. The commission consisted of five naval officers of high rank—one British, one Russian, one American, one French, and one Austrian—and sat at Paris in February 1905. The report of the commission stated that no torpedo-boats had been present, that the opening of fire on the part of the Baltic fleet was not justifiable, that Admiral Rostjstvensky, the commander of

the Baltic fleet, was responsible for the incident, but that these facts were 'not of a nature to cast any discredit upon the military qualities or the humanity of Admiral Rostjstvensky or of the personnel of his squadron.' In consequence of the last part of this report, Great Britain could not insist upon punishment of the responsible Russian admiral, but Russia paid a sum of £85,000 to indemnify the victims of the incident and the families of the two dead fishermen. See Martens, *N.R.G.*, 2nd ser., xxxiii. pp. 641-716; Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit* (1914), pp. 236-239.

For other instances of a Commission of Inquiry set up by special treaty see the case of the *Tavignano* and other French vessels in connection with the detention of, and firing upon, these vessels by Italian forces in the course of the war with Turkey in 1912 (see Scott, *Hague Court Reports*, 1st ser. (1916), pp. 413, 616), and the case of the Dutch ship *Tubantia* torpedoed in March 1916 by a German submarine, upon which the commission reported on February 27, 1922: see *A.J.*, xvi. (1922) pp. 485-492; and Scott, *Hague Court Reports*, 2nd ser. (1932), p. 135.

<sup>2</sup> See Articles 9-36 of the Convention.

between the United States of America and a great number of foreign States<sup>1</sup> by the series of so-called Bryan Arbitration Treaties signed at Washington in the autumn of 1914. These treaties were not all identical, but had the following features in common :

The High Contracting Parties agree to refer all disputes which diplomatic methods have failed to adjust to a Permanent International Commission for investigation and report, and they agree not to begin hostilities before the report is submitted. The Permanent Commissions are to be composed of five members ; each of the parties choosing one of its own subjects and one citizen of some third country, and the fifth member, also a subject of a third State, being chosen by common agreement between the two parties. The Commission may, by unanimous agreement, offer its services in a dispute even before the parties are compelled by failure of diplomatic negotiation to resort to it. Its report has to be completed within one year, unless the parties limit or extend the time by mutual agreement. The parties, having received the report, are to be at liberty to take such action as they may think fit.

All these treaties were concluded for a period of five years ; they were, however, to continue in force at the end of that time until twelve months after one of the parties had given notice of withdrawal. Most of them are still in operation.<sup>2</sup>

<sup>1</sup> See above, vol. i. § 50, and *A.J.*, vii. (1913) p. 823, viii. (1914) p. 565, and ix. (1915) pp. 195 and 494. The treaty with Great Britain was signed on September 15, 1914 (Treaty Series (1914), No. 16, Cmd. 7714), and ratified on November 10, 1914. See also Schücking, *Vermittlung*, pp. 123-152 ; Hyde, ii. § 558 ; Scherer, *Das Verleichtsverfahren* (1928).

The Bryan Arbitration Treaties are printed in *Treaties for the Advancement of Peace negotiated by the Hon. W. J. Bryan* (1920) (Carnegie Endowment for International Peace, with an introduction by J. B. Scott).

<sup>2</sup> A somewhat different International Commission was agreed upon by Argentina, Brazil, and Chile, by the Treaty of Buenos Ayres of May 25, 1915. See the text of the treaty in

Alvarez, *Grande guerre*, p. 68, and *R.G.*, xxii. (1915) p. 475. At the fifth Pan-American Conference, held at Santiago in March to May 1923, a Convention was signed which provided for the pacific settlement of disputes among the American Republics on lines which are substantially those of the Bryan Treaties, except that under the Santiago Convention the commissions of inquiry will not be permanent but will be constituted *ad hoc* in each case. See Scott in *A.J.*, xvii. (1923) p. 519 ; Galeano in *Grotius Society*, xv. (1930) pp. 1-15. A further advance was effected by the General Convention of Inter-American Conciliation signed at Washington on January 5, 1929. In addition to the procedure of inquiry the Convention provided for conciliation by the two



## 16 AMICABLE SETTLEMENT OF STATE DIFFERENCES [§ 11d

In 1928 and 1929 the United States concluded a further number of these treaties.<sup>1</sup>

The points in which they mark an advance upon the provisions of Hague Convention I. seem to be these : first, that there is no exclusion of disputes affecting honour and vital interests ; secondly, that the Commission of Inquiry is constituted in advance and is available when a dispute arises, whereas the Commissions of Inquiry under Hague Convention I. are constituted *ad hoc* and when required ; and, thirdly, that the principle of the *moratorium* appears in the undertaking not to resort to hostilities before the publication of the report of the Commission,<sup>2</sup> a principle which we find embodied in Article 12 of the Covenant in a more developed form.

Concilia-  
tion since  
the World  
War.

§ 11d. (i) *Conciliation under the Covenant of the League*.—Under Articles 11 and 15 of the Covenant of the League of Nations, the Council, or, in most cases, the Assembly, have powers of conciliation ; but it is more convenient to discuss these powers later as a part of the general machinery of the League for the settlement of disputes (see Section VIII.).

(ii) *Conciliation Treaties (under the Resolution of the Third Assembly of the League and Others)*.—There was, from

permanent commissions established by the Treaty of 1923 at Washington and at Montevideo. These commissions may act either on their own motion or at the request of a party to the dispute. See Jessup, *International Security* (1935), pp. 88-94 ; Hyde in *B.Y.*, 1929, pp. 102-110 ; Fischer Williams, *ibid.*, pp. 21, 22 ; Scott in *A.J.*, xxiii. (1929) pp. 143-152 ; Murdook, *ibid.*, pp. 278-281. The Convention is printed in *A.J.*, xxiii. (1929), Suppl., p. 76 ; Habicht, *op. cit.*, pp. 954-958 ; *Documents*, 1929, pp. 249-254 ; *U.S. Treaty Series*, No. 954 ; Hudson, *Legislation*, iv. p. 2635. See also the Anti-War Pact of Non-Aggression and Conciliation of October 1933, which is now binding upon a number of American and European States, including the United States of America : *Documents*, 1933, p. 475 ; *A.J.*, xxviii. (1934), Suppl., p. 79. See generally on settling of disputes between American States, Yepes and Pereira da Silva, *Com-*

*mentaire du Pacte de la Société des Nations*, ii. (1935) pp. 321-383 ; Berner, *Die panamerikanischen Friedenssicherungsverträge* (1938) ; Ceretti, *Panamericanismo e diritto internazionale* (1939), pp. 118-167. The Pan-American Conference of 1936 for the Maintenance of Peace (as to which see Toynbee, *Survey*, 1936, pp. 804-837) introduced a further innovation in the Treaty on Prevention of Controversies signed on December 23, 1936. In that Treaty the parties bound themselves to constitute permanent mixed commissions charged with the duty of studying 'the causes of future difficulties and controversies' with the view to proposing measures tending to promote good relations between the parties : *Documents*, 1936, p. 585.

<sup>1</sup> Some of these treaties are printed in Habicht, *op. cit.*, and in *A.J.*, xxiii. (1929), Suppl., pp. 197 *et seq.*

<sup>2</sup> See Kostoff, *Le moratoire de guerre* (1930), pp. 7-99.

the beginning of the work of the League and of the Council, a widespread feeling among many of its members that, without detracting from the conciliatory function of the Council, it was necessary to devise means for the establishment of some *non-political*<sup>1</sup> machinery of conciliation. Following the initiative on the part of the three Scandinavian States, as well as conciliation treaties concluded in 1919 between Great Britain and Brazil<sup>2</sup> and in 1920 between Sweden and Chile,<sup>3</sup> the Third Assembly unanimously adopted a Resolution concerning international conciliation. By this Resolution<sup>4</sup> the conciliatory functions of the Council of the League under Articles 15 and 17 of the Covenant were safeguarded and reserved; no universal commission of conciliation was established, but States were recommended to conclude treaties with one another providing for the establishment of commissions consisting of five members—two selected by each State, one its own subject, and the other the subject of a third State, and a president selected by these from among the subjects of a third State. This Resolution was, in effect, an attempt to decentralise the conciliation machinery of the Council of the League under the Covenant. A number of conciliation treaties referring expressly to the Resolution of the Third Assembly have been concluded.<sup>5</sup> In addition, there exists a conspicuous number of other conciliation treaties essentially identical with the former and concluded by States which,

<sup>1</sup> The term 'non-political' is not used here in the meaning of judicial settlement, but rather as indicating an expert, independent, and non-partisan type of conciliation as compared with that conducted by the Council, whose members are in law representatives of their States, and as such are not always free from political bias and from the influence of political considerations not necessarily connected with the merits of the actual dispute.

<sup>2</sup> April 4, 1919: *L.N.T.S.*, v. p. 46.

<sup>3</sup> March 26, 1920: *L.N.T.S.*, xi. p. 389.

<sup>4</sup> September 22, 1922: *Records of the Third Assembly, Plenary Meetings*, i. pp. 196-201; Ch. de Visscher in

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*R.I.*, 3rd ser., iv. (1923) pp. 21-33; Borsi in *Rivista*, 3rd ser., iii. (1924) pp. 3-26; Schücking, *Vermittlung*, pp. 272-302; Schücking und Wehberg, pp. 533-537; Erich in *R.I. (Geneva)*, ii. (1924) pp. 145-150.

<sup>5</sup> Denmark and Norway, Denmark and Sweden, Finland and Norway, Finland and Sweden, Norway and Sweden, concluded treaties with one another based on this Resolution. See, for instance, *L.N.T.S.*, xxviii. p. 310 (Norway and Sweden), or xxix. p. 29 (Finland and Sweden). See also the League publication entitled *Arbitration and Security*, C. 653. M. 216. 1927. V. pp. 145-198, for a number of conciliation treaties; practically all these treaties are printed in Habicht, *op. cit.*

as a rule, are already bound by obligations of judicial or arbitral settlement in regard to disputes described as capable of settlement by that method.<sup>1</sup>

(iii) *Conciliation in conjunction with Arbitration or Judicial Settlement*—the characteristic in this group of treaties being that conciliation is not an isolated institution standing by itself, but merely a part of a comprehensive machinery for peaceful settlement. These treaties are discussed below, VII., §§ 25ah-25aj.

- § 11e. Since the World War several hundred treaties providing for conciliation have been concluded and over one hundred permanent conciliation commissions have been actually set up.<sup>2</sup> However, there are no recorded instances of actual recourse to the machinery established by these treaties.<sup>3</sup> The more important disputes have been submitted to the Council of the League. In others the parties have succeeded in achieving a settlement through the avenues of negotiation or arbitration. It would seem that in the present stage of the commitments of pacific settlement the original function of conciliation has lost much of its significance, although the indirect pressure of the existence of conciliation machinery in the background may frequently tend to bring about a settlement by diplomatic means. Thus, for instance, the various treaties providing for arbitral or judicial settlement necessarily confer upon the agencies established by them the task of ascertaining the facts of the dispute<sup>4</sup>—a task which has generally been regarded as one of the principal functions of commissions of conciliation.<sup>5</sup> It is doubtful whether, so long as the

<sup>1</sup> See below, §§ 25h-25j.

<sup>2</sup> For the composition of the commissions see Habicht, *op. cit.*, pp. 1070-1078, and the various issues of the *Off. J.*

<sup>3</sup> On the work of the Commission of Investigation and Conciliation, which was not established by a pre-existing treaty, during one phase of the dispute between Paraguay and Bolivia, see *A.J.*, xxiii. (1929), Suppl., p. 98 (for the terms of the final protocol), and *ibid.*, pp. 110-112, and xxiv. (1930) pp. 122-127, 573-577 (on the work of the Commission). The Com-

mission was precluded from investigating the merits of the territorial dispute between the two countries (see below, § 25d); it was concerned with a frontier incident. See also the *Proceedings of Commission*, published in Washington in 1929, and the Report of the League Commission of May 1934: *A.J.*, xxviii. (1934), Suppl., pp. 164, 165.

<sup>4</sup> See below, p. 57.

<sup>5</sup> The ascertainment of the facts which gave rise to the Wal Wal incident between Italy and Abyssinia in December 1934 was entrusted to an

machinery of the League is available, Governments will be willing to entrust to untried conciliation commissions the task of considering grave disputes or claims for the change of the existing legal position in matters of importance.<sup>1</sup> On the other hand, conciliation commissions may serve a useful purpose by relieving the Council of the League of the consideration of insignificant controversies and by providing a means of limited effectiveness for the pacific solution of disputes not covered by commitments of obligatory arbitration or judicial settlement.<sup>2</sup>

## V

## ARBITRATION

Grotius, ii. c. 23, § 8—Vattel, ii. § 329—Hall, § 119—Westlake, i. pp. 350-368—Lawrence, § 221—Maine, pp. 210-218—Phillimore, iii. §§ 3-5—Twiss, ii.

arbitration commission by virtue of Article V. of the Treaty of Friendship between these two countries of August 1928, in which they undertook to submit disputes to 'a procedure of conciliation or arbitration.' For a discussion of these terms by reference to the work of the arbitration commission see Potter, *The Wal Wal Arbitration* (1938), pp. 19-24. See also the same in *A.J.*, xxx. (1936) pp. 27-44; Rousseau in *R.G.*, xlv. (1937) pp. 5-42.

<sup>1</sup> There must also be noted the disadvantages attaching to the fact that the multitude of treaties of conciliation, which do not impose any duty to accept the report of the commission, have created the misleading impression that the parties have undertaken substantial commitments in the sphere of pacific settlement. See Ruegger in *R.I.*, 3rd ser., x. (1929) pp. 91-106, for a survey of the causes of the non-fulfilment of the hopes connected with the machinery of conciliation.

From the general conciliation commission there must be distinguished conciliation commissions for special purposes, like the one constituted by the Boundary Waters Treaty of 1909, establishing the International Joint Commission between the United States and Canada: Smith, *The Economic Uses of International Rivers* (1931), pp. 123-135 (who also dis-

cusses other commissions); see Chacko, *The International Joint Commission* (1932); Corbett, *The Settlement of Canadian-American Disputes* (1937); MacKay in *A.J.*, xxii. (1928) pp. 292-318.

<sup>2</sup> New potentialities of conciliation by expert bodies were revealed by the Resolution of the Council of the League of January 28, 1932, adopting rules of procedure for the friendly settlement of economic disputes between States: Doc. C. 57. M. 32. 1932. II. B., and *A.J.*, xxvi. (1932) p. 354. The rules provided for the appointment by the Council of the League of a panel of economic experts from whom the parties, who may be either members of the League or States non-members, may choose a number of experts to deal with a dispute concerned with matters of an economic nature. For comment on these rules see Hudson in *A.J.*, xxvi. (1932) p. 354. By virtue of the Resolution of the Assembly of December 9, 1920, the Consultative and Technical Committee of the Organisation for Transit and Communications exercises some functions of conciliation. See Barandon, p. 128; *P.C.I.J.*, Series A, No. 23 (*Jurisdiction of the Oder Commission*), p. 15; *ibid.*, Series B, No. 14 (*Jurisdiction of the European Commission of the Danube*), pp. 15-21; and Rey in *Annuaire*, xxxv. (1) (1929) p. 438.

§§ 5-6—Taylor, §§ 357-358—Wharton, iii. § 316—Hershey, Nos. 309-313—Moore, vii. §§ 1069-1088—Bluntschli, §§ 488-498—Heffter, § 109—Bulmerincq in *Holtzendorff*, iv. pp. 30-58—Fauchille, §§ 944-969 (9)—Pradier-Fodéré, vi. Nos. 2602-2630—Mérignhac, i. pp. 448-485—Rivier, ii. § 59—Calvo, iii. §§ 1706-1806—Fiore, ii. Nos. 1202-1215, and *Code*, Nos. 1299-1385—Nys, ii. pp. 547-576—Martens, ii. § 104—Liszt, § 53—Cruchaga, §§ 710-757—Rolin, §§ 66-71—Hyde, ii. §§ 559-583—Fenwick, pp. 408-418—Holland, *Lectures*, pp. 211-219—Barandon, pp. 234-255—Stowell, pp. 647-660—Garner, *Developments*, pp. 464-525—Rouard de Card, *L'arbitrage international* (1877)—Mérignhac, *Traité théorique et pratique de l'arbitrage* (1895)—Moore, *History and Digest of the Arbitrations to which the United States has been a Party*, 6 vols. (1898)—Darby, *International Tribunals*, 4th ed. (1904)—Dumas, *Les sanctions de l'arbitrage international* (1905), and in *A.J.*, v. (1911) pp. 934-957—Nippold, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten* (1907)—Scott, *Conferences*, pp. 188-253—Lapradelle et Politis, *Recueil des arbitrages internationaux*, i. (1798-1855) (1905), and ii. (1856-1872) (1924)—Fried, *Handbuch der Friedensbewegung*, 2nd ed. (1911), i. pp. 137-184—Lammasch, *Die Rechtskraft internationaler Schiedssprüche* (1913), and *Die Lehre von der Schiedsgerichtsbarkeit* (1914)—Balch, *International Courts of Arbitration* (6th ed., with an introduction and additional notes by Thomas Willing Balch, 1915)—Pollock, *The League of Nations*, 2nd ed. (1922), pp. 17-46—Politis, *La justice internationale* (1924), pp. 24-100—Hoijer, *La solution pacifique des litiges internationaux* (1925), pp. 101-291—Scott, *Sovereign States and Suits before Arbitral Tribunals and Courts of Justice* (1925), pp. 81-121—Ralston, *The Law and Procedure of International Tribunals* (revised ed., 1926), *Supplement* (1936); and the same, *International Arbitration from Athens to Locarno* (1929)—Thieme, *Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Weltkrieg* (1927)—Kaufmann, *Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Weltkrieg* (1927)—Clad, *Wesen und Grenzen der internationalen Schiedsgerichtsbarkeit* (1928)—Brendt, *Das Obligatorium in der internationalen Schiedsgerichtsbarkeit* (1928)—Moore, *International Adjudications*, Modern Series, i. (1929) pp. xiv-xli—Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (1929)—Ascher, *Wesen und Grenzen der internationalen Schiedsgerichtsbarkeit* (1929)—Dotremont, *L'arbitrage international et le Conseil de la Société des Nations* (1929), pp. 7-37, 277-299—Bishop, *International Arbitral Procedure* (1931)—Goetze, *Die Zuständigkeit der internationalen Gerichtshöfe* (1933)—Witenberg, *L'organisation judiciaire. La procédure et la sentence internationales* (1937)—Schindler, *Die Schiedsgerichtsbarkeit seit 1914* (1938)—Stuyt, *Survey of International Arbitrations, 1794-1938* (1939)—Russell in *Law Quarterly Review*, xii. (1896) pp. 311-336—Balch, *Arbitration as a Term of International Law* (reprint from the *Columbia Law Review*) (1915)—Pollock in *Law Quarterly Review*, xxxv. (1919) pp. 320-333—Loder in *Bulletin de l'institut intermédiaire international*, ix. (1923) pp. 257-285—Castberg in *R.I.*, 3rd ser., vi. (1925) pp. 156-172 and 310-348—Hedges in *B.Y.*, 1926, pp. 110-120—De la Barra and Mercier (including notes by Hammarskjöld and others) in *Annuaire*, xxxiii. (2) (1927) pp. 565-668—Raestad in *R.I. (Paris)*, i. (1927) pp. 373-415—Schindler in *Hague Recueil*, 1928 (v.), pp. 273-361—Le Fur in *Sirey*, 1929 (1), pp. 125-152—Balladore Pallieri in *Rivista*, xxi. (1929) pp. 328-355—Makowski in *Hague Recueil*, 1931 (ii.), pp. 267-384.

For information as to arbitration treaties and treaties of judicial settlement, past and current, see the following : *Traité généraux d'arbitrage communiqués au Bureau International de la Cour Permanente d'Arbitrage*, published by the Court—La Fontaine, *Pacific international* (1902)—Manning, *Arbitration Treaties among the American Nations* (1924)—Habicht, *Post-War Treaties for Pacific Settlement of International Disputes* (1931)—*Arbitration and Security, Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security deposited with the League of Nations*, Doc. C. 653. M. 216. 1927. V.—Clad, *op. cit.*, pp. 5-35—Cory, *Compulsory Arbitration of International Disputes* (1932)—Colt de Wolf, *General Synopsis of Treaties of Arbitration, Conciliation, Judicial Settlement, Security and Disarmament, actually in force between Countries invited to the Disarmament Conference* (1933)—*Friedenswarte*, 35 (1935), pp. 145 *et seq.*—*Politische Verträge*, ed. by Bruns (1936), i. pp. 529 *et seq.* See also Jessup and Hill as quoted below, p. 34, n. 1—*Publications of the Permanent Court of International Justice*, Series D and E.

§ 12. Arbitration means the determination of a difference between States through a legal decision of one or more umpires or of a court, other than the Permanent Court of International Justice, chosen by the parties. As there is no central political authority above the Sovereign States, and no such international court as can exercise jurisdiction over them without their consent, one State cannot as a general rule summon another to appear before a court for the purpose of settling a difference between them in the way that private individuals can compel one another to litigate under the municipal law to which they are subject. As the Permanent Court of International Justice said in 1923 : 'It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement. Such consent can be given once and for all in the form of an obligation freely undertaken, but it can, on the contrary, also be given in a special case apart from any existing obligation.'<sup>1</sup>

It seems desirable, now that there exists a Permanent Court of International Justice side by side with the Permanent 'Court' of Arbitration and many temporary arbitration tribunals, that the formal difference between the award of a tribunal of arbitration and the judgment of a court of justice should be clearly recognised by Inter-

<sup>1</sup> *Eastern Carelia Advisory Opinion*, Series B, No. 5, at p. 27.

national Law.<sup>1</sup> On the other hand, it is important not to attribute to that distinction any decisive importance beyond that inherent in the nature of the adjudicating body. The award of the arbitrator and the decision of the Court are both based on law. We shall now proceed, in this section, to consider arbitration in the narrow sense, leaving the Permanent Court of International Justice for Section VI.

Treaty of  
Arbitra-  
tion.

§ 13. It is necessary, as has been pointed out in the preceding paragraph, for such conflicting States as intend to have the conflict determined by arbitration to conclude a treaty by which they agree to this course. Such a treaty of arbitration imposes an obligation on both parties to submit in good faith to the decision of the arbitrators. Frequently a treaty of arbitration will be concluded after the occurrence of a difference; but it also frequently happens that States concluding a treaty stipulate by the so-called Compromise Clause<sup>2</sup> that any difference arising between them respecting matters regulated by the treaty shall be determined by arbitration. Two or more States can also conclude a so-called general treaty of arbitration stipulating that all or certain kinds of differences arising in

<sup>1</sup> The Covenant of the League, as amended in September 1924, after the establishment of the Court, throughout recognises the distinction between 'arbitration' and 'judicial settlement,' 'decision' and 'award.' The recognition of these distinctions in this work must not, therefore, be regarded as involving the branding of arbitration in the narrow sense as unjudicial. On the question of the nature of arbitration as distinguished from judicial settlement see Oppenheim, *The Future of International Law* (1911) (English translation, in 1921), § 57; Loder, *op. cit.*, above, § 12; Lauterpacht, *The Function of Law*, pp. 378-382; Moore, *International Adjudications*, Modern Series, i. (1929) pp. xiv-xci; Brown in *R.I.*, 3rd ser., v. (1924) pp. 317-332; Hedges in *B.Y.*, 1926, pp. 110-120. But see Wehberg, *The Problem of an International Court of Justice* (English trans., 1918), pp. 12-29; the same in *Hague Recueil*, 1925 (i.), pp. 60-78; Borel and Politis in *An-*

*nuaire*, xxxiii. (2) (1927) pp. 680-693; Garnier-Coignet in *R.I.* (Paris), iv. (1930) pp. 123-147; Gonsiorowski in *A.J.*, xxvii. (1933) pp. 469-490. See also the *Observations* of Judge Kellogg in the *Swiss-French Free Zones* case (Second Phase), Series A, No. 24, pp. 33-38.

Before the World War there was a tendency to deny the judicial character of arbitration, as it then existed, in order to strengthen the argument for the establishment of a true international court able to develop International Law by the continuity of its pronouncements and the permanency of its personnel. This consideration has now disappeared with the establishment of the Permanent Court of International Justice. The other cause, still existing, of the failure to recognise the legal character of arbitration is the desire to preserve a procedure enabling the arbitrators to go beyond the existing law. See below, § 15.

<sup>2</sup> See above, § 3, and vol. i. § 553.

future between them shall be settled by this method. Until the Hague Peace Conference of 1899, however, general treaties of arbitration were not numerous. After that, following upon the general arbitration treaty between Great Britain and France of 1903,<sup>1</sup> they became quite frequent. This tendency has continued after the World War, although the more normal course is now to provide for the settlement of disputes by a judicial decision of the Permanent Court of International Justice.<sup>2</sup> But many treaties, especially those concluded by the United States, still provide for arbitration either exclusively<sup>3</sup> or unless the parties agree on some other competent tribunal.<sup>4</sup> Finally, others, like the General Act for the Pacific Settlement of International Disputes and treaties of a similar type, in addition to conferring jurisdiction upon the Permanent Court of International Justice, provide, in regard to so-called 'political' disputes, for arbitration apparently conceived as a means of settlement lying half-way between judicial settlement and conciliation.<sup>5</sup>

§ 14. States which conclude an arbitration treaty have to agree upon the arbitrators. Who is to arbitrate? The parties may choose a head of a third State as arbitrator. But he rarely, if ever, investigates the matter himself; he chooses one or more individuals, who make a report and propose a verdict, which he pronounces. The parties may agree to entrust the arbitration to any other individual, or to a body of individuals, a so-called arbitration commission or tribunal. Finally, the parties may entrust a mixed commission, usually composed of the two national commissioners and an umpire, with the determination of a large number of claims put forward by one or both parties.<sup>6</sup> General arbitra-

<sup>1</sup> See below, § 17.

<sup>2</sup> See below, § 25*ae*.

<sup>3</sup> See, e.g., the Treaty of Arbitration between the United States and Liberia of September 27, 1926, *L.N.T.S.*, 56, p. 280.

<sup>4</sup> See, e.g., the Treaty of Arbitration between Austria and the United States of August 16, 1928, *L.N.T.S.*, 88, p. 96. For other treaties of the same type see *A.J.*, xxiv. (1929), Suppl., pp. 197-234. Other treaties provide expressly for submission to

the Permanent Court of International Justice, but leave it open to the parties to resort to arbitration. See, e.g., the Treaty between Japan and Switzerland of December 26, 1924, *L.N.T.S.*, 43, p. 394.

<sup>5</sup> See below, § 25*aj*.

<sup>6</sup> See Fauchille, § 970 (17); in *B.Y.*, 1925, pp. 61-67; Witenberg, *op. cit.* (at p. 20), pp. 35-60; Schindler, *Die Schiedsgerichtsbarkeit seit 1914* (1938), pp. 129-138; and below, § 18.



tion treaties usually provide for appointment of arbitrators by way of a special agreement. Many treaties lay down that in the case of the failure of the parties to reach an agreement as to the appointment of the arbitrators, the duty of appointing them shall devolve upon the President of the Permanent Court of International Justice.<sup>1</sup>

The Law  
Applied  
by Ar-  
bitrators.

§ 15. The treaty of arbitration usually stipulates the principles according to which the arbitrators have to give their award. These principles are normally the general rules of International Law, but if the parties so desire, they may be rules of equity,<sup>2</sup> or other rules specially laid down in the treaty of arbitration for the special case.<sup>3</sup> In default of any express provision, it must be presumed that the award is to be given according to principles of International Law.<sup>4</sup>

<sup>1</sup> See, e.g., the Treaty between Estonia, Latvia, Finland, and Poland of January 17, 1925, *L.N.T.S.*, 38, p. 458. And see the various issues of Series E of the Publications of the Court, where detailed information will be found on the various missions entrusted to the Court or its President in this connection.

<sup>2</sup> On the meaning of equity and, generally, the right of the arbitrator to decide in accordance with equity, see Strupp, *Das Recht des internationalen Richters, nach Billigkeit zu statuieren* (1930), pp. 97-109, and in *Hague Recueil*, 1930 (iii.), pp. 357-478; Habicht, *ibid.*, 49 (1934) (iii.), pp. 281-369 (translated into English under the title *The Power of the International Judge to Give a Decision 'ex aequo et bono'* (1935)); Friedmann, *The Contribution of English Equity to the Idea of an International Equity Tribunal* (1935); Lauterpacht, *The Function of Law*, pp. 313-318; Berlia, *Essai sur la portée de la clause de jugement en équité en droit des gens* (1937); Orfield in *Kentucky Law Journal*, xviii. (1929-1930) pp. 31-57, 116-140; Mouskhéli in *R.G.*, xl. (1933) pp. 347-373; Borel in *Annuaire*, xxxviii. (1934) pp. 210-224; Decencière-Ferrandiére in *R.G.*, xli. (1934) pp. 148-178; *Annuaire*, xl. (1937) p. 271. See also *ibid.*, pp. 313-315, for examples of treaties conferring upon the tribunal the power to decide in accordance with equity. And see Norwegian Shipowners Claim (*Norway*

*v. United States*), October 13, 1922, *A.J.*, xvii. (1923) pp. 383, 384, the *Georges Pinson* case decided in October 1928 by the French-Mexican Claims Commission, *Annual Digest*, 1927-1928, Case No. 318, and the Guatemala-Honduras Boundary Arbitration of 1933 (as to which see *Annual Digest*, 1933-1934, Case No. 46 (vi.), and Bello Codesido, *El Arbitraje y la Equidad* (1939)). As to the Permanent Court see below, p. 62.

<sup>3</sup> See, for instance, as to the 'Three Rules of Washington,' below, § 335. See also the Treaty of February 2, 1897, between Great Britain and Venezuela, defining the period and requirements of prescription as a title of acquisition of territory (*British and Foreign State Papers*, lxxxix. (1896-1897) p. 57). And see, generally, Lauterpacht, *The Function of Law*, pp. 328, 329.

<sup>4</sup> See Lammasch, *Die Rechtskraft internationaler Schiedssprüche* (1913), pp. 36-67, and *Die Lehre von der Schiedsgerichtsbarkeit* (1914), pp. 175-186; Balch, *Arbitration as a Term of International Law* (reprint from the *Columbia Law Review*) (1915); Schindler, *op. cit.*, pp. 155-164; Castberg in *R.I.*, 3rd ser., vi. (1925) pp. 168-172; Ralston, *International Arbitration from Athens to Locarno* (1929), pp. 3-30; and the writers referred to above, n. 2, and p. 22, n. 1.

In former editions the above sentence ended with the words 'or, if

The treaty also frequently lays down rules of procedure to be followed by the arbitrators or empowers them to lay down the rules of procedure.<sup>1</sup>

While an arbitral decision disregarding the existing law in order to achieve a compromise is clearly inconsistent with the arbitral function, there is nothing to prevent the arbitrators from adding to their award recommendations of a non-binding character embodying an appeal to the generosity of the parties.<sup>2</sup> From these cases there must be distinguished arbitral decisions in which the tribunals have availed themselves of the power conferred upon them by the parties to propose recommendations in addition to the award based on rules of International Law. This occurred, *inter alia*, in the Behring Sea and North Atlantic Fisheries Arbitrations between Great Britain and the United States.<sup>3</sup> On occasions arbitral tribunals have been entrusted with the functions of a legislative nature as distinguished from that of applying existing law. Thus, for instance, on December 1, 1933, an arbitral tribunal laid down the details of the future régime of the Free Zones of Upper Savoy and the District of Gex between France and Switzerland.<sup>4</sup>

there are none applicable, according to rules of equity.' But see above, p. 22, n. 1, and below, p. 82, n. 1. It is essential for the understanding of modern arbitration to realise that, apart from isolated exceptions, it has been a process of deciding disputes by the application of rules of law subject to special instructions of the parties as laid down in the arbitration agreement. The history of international arbitration shows no instances of the arbitrators refusing to give a decision on the ground of the absence of applicable rules of International Law. For a survey of treaty provisions defining the rules of law to be applied by arbitrators see Lauterpacht, *Analogies*, § 26; *Cayuga Indians Claims case*, A.J., xx. (1926) pp. 581-586; Strupp in *Hague Recueil*, 1930 (iii.), pp. 437-459; Habicht, *op. cit.*, pp. 1048-1053; *Arbitration and Security*, as referred to above, § 12, pp. 40-47.

<sup>1</sup> See Ralston, *The Law and Procedure of International Tribunals* (1926), and *Supplement* (1936);

Schindler, *op. cit.*, pp. 138-154; Witenberg, *L'organisation judiciaire. La procédure et la sentence internationales* (1937), pp. 169-264. As to evidence see Sandifer, *Evidence before International Tribunals* (1939) (an important treatise); Witenberg in *Hague Recueil*, 56 (1936) (ii.), pp. 5-105; Krusch in *II. Internationale Kongress für Rechtsvergleichung im Haag* (1937), pp. 535-554. See also Cansacchi, *Le presunzioni nel diritto internazionale* (1939).

<sup>2</sup> See for examples of such recommendations Lauterpacht, *The Function of Law*, pp. 311-313.

<sup>3</sup> *Ibid.*, pp. 310, 311.

<sup>4</sup> For the award see P.C.I.J., Series E, No. 10, pp. 106-127. See also *Annual Digest*, 1933-1934, Case No. 190 and Note, for awards rendered in 1934 and regulating the régime of certain railways subsequent to the dismemberment of Austria and Hungary. In the Treaty of Peace of July 21, 1938, between Bolivia and Paraguay six American Republics,

Binding  
Force of  
Arbitral  
Verdict.

§ 16. An arbitral award<sup>1</sup> is final if the arbitration treaty does not stipulate the contrary,<sup>2</sup> and is binding upon the parties. As, however, no central authority exists above the States to execute the award against a State refusing to submit, in case of such a refusal the other party has the right to enforce the arbitral award by such compulsive means as are open to it under International Law.<sup>3</sup> Yet it is

including the United States, were appointed arbitrators 'in equity' to determine the dividing line in the Chaco between Bolivia and Paraguay. They were instructed to give the award *ex aequo et bono* in accordance with the provisions of the Treaty: *A.J.*, xxxii. (1938), Suppl., p. 139.

<sup>1</sup> Its effect is discussed in all its details in Lammash, *Die Rechtskraft*, etc., pp. 91-128; Stoykovitch, *De l'autorité de la sentence arbitrale en droit international public* (1924); Ralston, *International Arbitration from Athens to Locarno* (1929), pp. 90-114; Limburg in *Hague Recueil*, 1929 (v.), pp. 523-617; Morelli, *La sentenza internazionale* (1931); the same in *Hague Recueil*, 61 (1937) (iii.), pp. 286-339; Witenberg, *L'organisation judiciaire. La procédure et la sentence internationales* (1937), pp. 265-379; Balasko, *Causes de nullité de la sentence arbitrale en droit international public* (1938) (a comprehensive treatise); Markovitch, *Du caractère définitif des sentences arbitrales* (1937); Salvioni in *Rivista*, xxix. (1937) pp. 305-323; Scalfati, *ibid.*, xxxi. (1939) pp. 361-377. And see below, p. 29, n. 1.

<sup>2</sup> See, e.g., the Agreement of May 5, 1936, between Belgium and France in which the arbitrator was asked to give an *opinion* (as distinguished from an award) which, however, the parties undertook to accept subject, in the case of France, to the constitutional prerogatives of the French Parliament. For the Opinion, given on March 1, 1937, see *Recueil Général de Droit International*, 1939, Part II. p. 1.

<sup>3</sup> The desire to secure the execution of arbitral awards has led, on the part of some writers, to the proposal to establish an international police force. See Vollenhoven in *R.I.*, 2nd ser., xiii. (1911) pp. 79-85; Eysinga in *Z.V.*,

v. (1911) pp. 527-534; Erich in *Z.V.*, vii. (1913) pp. 308-325. See also Kelsen in *Z.ö.R.*, xiv. (1934) pp. 240-255; Goubbran, *Le problème des sanctions dans l'évolution de l'arbitrage international* (1925); Hambro, *L'exécution des sentences internationales* (1936). As to the effect of, and sanctions attached to, awards or decisions given in regard to disputes falling within the Covenant of the League, see below, §§ 25b-25g.

The establishment of executive and police organs of the international community, in particular for enforcing the obligations of States in the sphere of pacific settlement of disputes, far from being inconsistent with the nature and purposes of International Law, would constitute an important guarantee of its observance and development as a true body of law. But the establishment of an international police force is not necessarily the next step in the evolution towards a better organised international society. An essential condition of such a force must be the constitution of an executive international organ, able to take effective decisions by an appropriate majority with a view to directing the activities of the police force. No such organ exists at present.

On the other hand, it seems that so far the principal difficulty has been not to enforce decisions of international tribunals, but to induce States to submit their disputes for adjudication in treaties of obligatory judicial or arbitral settlement. Refusals to execute arbitral decisions are remarkably few, and as a rule accompanied by the allegation of excess of jurisdiction (see below). As to the execution of the judgments and advisory opinions of the Permanent Court of International Justice see Hudson, *Permanent Court*, pp. 429-

obvious that an arbitral award is only binding provided that the arbitrators have in every way fulfilled their duty as umpires, and have been able to arrive at their award in perfect independence. Should they have been bribed, or not followed their instructions, should their award have been given under the influence of coercion of any kind, or should one of the parties have intentionally and maliciously led the arbitrators into an essential material error, the award would have no binding force whatever.<sup>1</sup> Thus the award given in 1831 by the King of Holland in the North-Eastern Boundary Dispute between Great Britain and the United States of America was not considered binding by the parties, because the arbitrator had transgressed his powers.<sup>2</sup> For the same reason, Bolivia refused to submit to the award given in 1909 by the President of Argentina in her boundary dispute with Peru.<sup>3</sup> And in October 1910 the Permanent Court of Arbitration at The Hague, deciding the case of the United States of America against the United States of Venezuela concerning the claims of the Orinoco Steamship Company, annulled,<sup>4</sup> with regard to certain points, a previous arbitration award given by Mr. Barge.

In all these and similar cases actual or alleged excess of jurisdiction has been the principal cause of the refusal to recognise the award as binding. In this matter arbitral tribunals have been exposed to the possible conflict of two fundamental principles governing their activity. The first is that their jurisdiction is essentially grounded in the will

432, 457-466. In the *Wimbledon* (Series A, No. 1, p. 32) the Court refused to award a higher rate of interest in the event of its judgment not being complied with on the ground that it 'neither can nor should contemplate' such a contingency.

<sup>1</sup> In December 1933 the Mixed Claims Commission between the United States and Germany rendered a decision in which it asserted its right to re-open a case in which a wrong award had been given because of misinterpretation of evidence, mistake in calculation, and, in particular, as in the case before it, because of fraud, collusion, and sup-

pression of evidence: *United States of America on behalf of Lehigh Valley Railroad Co. and Others v. Germany* (A.J., xxxiv. (1940) p. 154). See for learned comment on this decision Woolsey, *ibid.*, pp. 23-35. And see below, p. 566.

<sup>2</sup> See Moore, vii. § 1082; Moore, *Arbitrations*, i. pp. 85-161; Asser in *Lapradelle and Politis*, i. pp. 355-400; Lauterpacht, *The Function of Law*, pp. 127-130.

<sup>3</sup> See Fiore in *R.G.*, xvii. (1910) pp. 225-256, and Martens, *N.R.G.*, 3rd ser., iii. p. 53.

<sup>4</sup> See Martens, *N.R.G.*, 3rd ser., iv. p. 79.

of the parties as expressed in the *compromis* or in the general arbitration treaty, and that an award rendered in excess of the power conferred upon them is null and void as having no legal basis whatsoever. The other principle is that in case of doubt the arbitrator is entitled to interpret the *compromis* or the treaty and thus to determine the scope of his jurisdiction.<sup>1</sup> There seems to exist no provision of a general nature for the solution of controversies arising out of the allegation of a party that an arbitral award has been rendered in excess of the power conferred upon the arbitrator and is therefore null and void. The protracted dispute between Roumania and Hungary in 1927 and in the subsequent years<sup>2</sup> revealed the dangers of the existing legal position. In that dispute Roumania denied the validity of the award rendered in January 1927 by the Roumano-Hungarian Mixed Arbitral Tribunal which declared itself competent, under Article 250 of the Treaty of Trianon, to decide on certain claims submitted by owners of Hungarian nationality in respect of their property subjected to measures of liquidation in pursuance of a general scheme of agrarian reform in Roumania.<sup>3</sup> The disturbing consequences of that dispute revealed the necessity of providing for some measure of appeal against awards of arbitral tribunals, in particular in cases of excess of jurisdiction. There is nothing inherent in the nature of arbitral awards to render them final beyond the possibility of appeal. Accordingly, it has been suggested by some members of the League, notably by Finland and Poland, that the Permanent Court of International Justice should be given the power to hear appeals in such cases.<sup>4</sup> It is to be hoped that objections of a secondary nature will

<sup>1</sup> See Lauterpacht, *Analogies*, §§ 90, 111. For an early affirmation of that principle see the Opinions in the *Betsey* (Mixed Commission between the United States and Great Britain under the Jay Treaty of 1794), Moore, *International Adjudications*, Modern Series, iv. (1931) pp. 182 *et seq.*

<sup>2</sup> An embarrassing abundance of articles and opinions on this subject will be found in the various periodicals of International Law in the years

1927-1930. For an historical account of the first stages of the dispute see Toynbee, *Survey*, 1929, pp. 168-182. And see Wheeler-Bennett, *Information on the Reparation Settlement* (1930), pp. 155-159, for an account of the final settlement of the controversy.

<sup>3</sup> *Emerio Kulin v. Rumanian State*, *Annual Digest*, 1927-1928, Case No. 59.

<sup>4</sup> See Hudson, *Permanent Court*, pp. 373-375, for a detailed account of these proposals.

not be allowed to stand in the way of a proposal whose adoption is calculated to save International Law from much discredit. In individual cases such jurisdiction on appeal has in fact been conferred upon the Permanent Court of International Justice.<sup>1</sup>

§ 17. It is often maintained that it is impossible to determine by arbitration every conceivable difference between States, and, consequently, efforts are made to distinguish those groups of State differences which are determinable by arbitration from those which are not. Now, although all States may hesitate to have all possible differences decided by arbitration, theoretically there is no reason to distinguish between differences on the ground that some can, and others cannot, be decided through arbitration.<sup>2</sup> For there can be

What Differences can be decided by Arbitration.

<sup>1</sup> See the judgment of the Court in the case relating to the Royal Hungarian Peter Pázmány University decided on December 15, 1933, Series A/B, No. 61. In an agreement signed at Paris, on April 28, 1930, Czechoslovakia and Hungary agreed to recognise, without any special agreement, a right of appeal to the Permanent Court of International Justice from all judgments on questions of jurisdiction or merits given 'henceforth' by the Mixed Arbitral Tribunal in certain classes of cases: *L.N.T.S.*, 121, p. 81. See also the Judgment of December 16, 1936—an appeal from certain judgments of the Hungaro-Yugoslav Mixed Arbitral Tribunal (Series A/B, No. 68).

On the question of appeal against arbitral awards and on excess of jurisdiction see Lammasch, *Die Rechtskraft internationaler Schiedssprüche* (1913), pp. 129-209, and *Die Lehre von der Schiedsgerichtsbarkeit* (1914), pp. 212-224. See also Donker, Curtius, and Nys in *R.I.*, 2nd ser., xii. (1910) pp. 5 and 595; Casasus and McKenney in the *Proceedings of the American Society of International Law*, vi. (1912) pp. 59 and 63; Pradier-Fodéré, vi. sec. 2628; Fiore, ii. sec. 1215; Hyde, ii. § 582; Nippold, *Die Fortbildung des Verfahrens in internationalen Streitigkeiten* (1907), pp. 347-373; Schätzkel, *Rechtskraft und Aufhebung von Entscheidungen internationaler Gerichte* (1928); Niemeyer, *Das völkerrechtliche Nicht-*

*Urteil* (1931); Scelle in *R.G.*, xviii. (1911) pp. 185-202, xxxiv. (1926) pp. 445, 446; Castberg in *R.I.*, 3rd ser., vi. (1925) pp. 342-348; Verdross, *ibid.*, ix. (1928) pp. 225-242; Ch. de Visscher, *ibid.*, pp. 53-68; Lapradelle in *R.I. (Paris)*, ii. (1928) pp. 5-64; Borel in *Hague Recueil*, 52 (1935) (ii.), pp. 5-105; Thévenaz in *R.G.*, xlv. (1939) pp. 53-62; Hertz in *R.I.*, 3rd ser., xx. (1939) pp. 450-500. And see the literature referred to above, p. 26, n. 1; and, with special reference to the proposals to confer upon the Permanent Court of International Justice jurisdiction on appeal in such cases, Lauterpacht in *B.Y.*, 1928, pp. 117-120; Brierly, *ibid.*, pp. 114-117; Paul de Vineuil in *R.I.*, 3rd ser., xi. (1930) pp. 759-763; Erich, *ibid.*, xii. (1931) pp. 268-279, and in *Acta Scandinavica*, i. (1930) pp. 25-36; Raestad in *R.I.*, 3rd ser., xi. (1930) pp. 302-325; Castberg in *Hague Recueil*, 1931 (i.), pp. 357-469 (with a detailed bibliography); Salvioli, *ibid.*, 1933 (iv.), pp. 149-161; Rundstein, *ibid.*, 1933 (i.), pp. 5-113; Bedoya in *R.I. (Paris)*, x. (1932) pp. 142-167; Garner, *A.J.*, xxvi. (1932) pp. 126-133. And see for the Report of the Committee of Jurists entrusted by the Council with the study of this question Doc. C. 338. M. 138. 1930. V.

<sup>2</sup> On the attempt to classify disputes as 'justiciable' and 'non-justiciable' see above, § 1 (n.).

no doubt that, the consent of the parties once given, every possible difference might be settled through arbitration.

But, differing from the theoretical question as to what differences are, and what are not, determinable by arbitration, is the question what kind of State differences *ought* always to be settled in this manner. An attempt to answer the latter question was made by Article 16 of the Hague Convention of 1899, and by Article 38 of the Hague Convention of 1907, for the Pacific Settlement of International Disputes, whereby the contracting Powers recognised arbitration as the most efficacious and at the same time the most equitable means of determining differences of a judicial character in general, and in especial differences regarding the interpretation or application of international treaties. In 1903, Great Britain and France, following the suggestion of this Article 16, concluded a treaty in which they agreed to settle by arbitration all such differences of a legal nature as did not affect their vital interests, their independence, their honour,<sup>1</sup> or the interests of third States, and many other States followed the lead. Great Britain, in the following years, entered into such arbitration treaties with sixteen States.<sup>2</sup>

There was a flaw in all these treaties, because the decision as to whether a difference was of a legal nature or not was left to the discretion of the parties. Cases have happened in which one party has claimed to have a difference settled by arbitration on account of its legal nature, whereas the other party has denied its legal nature, and, therefore, refused to go to arbitration.<sup>3</sup> For this reason the arbitration treaties signed on August 3, 1911, between the United States

<sup>1</sup> For the meaning of these expressions see Wehberg and Calvacanti respectively on 'Restrictive Clauses in International Arbitration Treaties' in *A.J.*, vii. (1913) pp. 301-314, and viii. (1914) pp. 723-737; Hyde, ii. § 567; Barandon, pp. 222-228; Clad, *Internationale Schiedsgerichtsbarkeit* (1928), pp. 59-72, 111-114; Morgenthau, *Die internationale Rechtspflege* (1929), pp. 98-104, 112-130; Ralston, *International Arbitration from Athens to Locarno* (1929), pp. 31-47; Wilson

in *A.J.*, xxiii. (1929) pp. 68-93. And see, for a historical and sociological gloss on the conception of national honour and interests, Beard, *The Idea of National Interest* (1934).

<sup>2</sup> Practically all these treaties have now been replaced by the more comprehensive obligations of judicial settlement like the Optional Clause (see below, § 25*ae*) and others.

<sup>3</sup> For examples see Lauterpacht, *The Function of Law*, pp. 194-199.

of America and Great Britain and between the United States of America and France would have been epoch-making had they been ratified, since Article 3 provided that, in cases where the parties disagreed as to whether or not a difference was subject to arbitration under the treaty concerned, the question should be submitted to a Joint High Commission of Inquiry; and that, if all, or all but one of, the members of that commission decided the question in the affirmative, the case should be settled by arbitration. This article was, however, struck out by the American Senate, and the treaties were not ratified.<sup>1</sup> The arbitration treaties concluded by the United States in the years 1928 and 1929<sup>2</sup> and including a number of comprehensive reservations<sup>3</sup> brought no change in this respect. Their effect has been further weakened by the provision making the arbitration of any individual dispute dependent upon the conclusion of a special agreement requiring the consent and advice of two-thirds of the Senate of the United States.<sup>4</sup> These factors have the result of depriving the treaties in question to a large extent of a *vinculum juris* which is independent of the will of the parties; to that extent they are treaties of obligatory arbitration in name only.<sup>5</sup>

<sup>1</sup> See Dennis in *A.J.*, vi. (1912) pp. 614-628; *A.S. Proceedings*, vi. (1912) pp. 87-114; Vlietinck in *R.I.*, 2nd ser., xv. (1913) pp. 307-332 and 417-444; Snow, *The American Philosophy of Government* (1921), pp. 233-266.

<sup>2</sup> See *A.J.*, xxiii. (1929), Suppl., pp. 197-234.

<sup>3</sup> They exclude, *inter alia*, from the operation of the treaty disputes the subject-matter of which: (a) is within the domestic jurisdiction of either of the contracting parties; (b) involves the interests of third parties; (c) depends on, or involves, the maintenance of the Monroe Doctrine. The first two reservations appear also in the General Treaty of Inter-American Arbitration of January 5, 1929 (ratified by the United States in April 1935). The Treaty is printed in *U.S. Treaty Series*, No. 886; Hudson, *Legislation*, iv. p. 2625; *A.J.*, xxiii. (1929), Suppl., p. 82. For comment on this Treaty see Montluc in

*R.I.* (Geneva), vii. (1929) pp. 1 *et seq.*; Murdock in *A.J.*, xxiii. (1929) pp. 282-289; Fischer Williams in *B.Y.*, x. (1929) pp. 14-22.

<sup>4</sup> With regard to the Inter-American Arbitration Treaty of 1929 see Myers in *A.J.*, xxx. (1936) pp. 57-62, who points to the fact that the approval of the Senate of the United States was given in a form suggesting that the participation of the Senate in the conclusion of any special arbitration agreement under the general arbitration treaty is no longer required.

<sup>5</sup> For comment on these treaties see Jessup, *The United States and Treaties for the Avoidance of War* (International Conciliation Pamphlet No. 239, 1928), pp. 200-206; Hudson in *A.J.*, xxii. (1928) pp. 368 *et seq.*; Garner, *ibid.*, xxiii. (1929) pp. 595 *et seq.*; Anderson in *A.S. Proceedings*, 1929, pp. 113-119.



As to the scope of reservations, there has, on the whole, been a tendency to abandon the indefinite reservations of independence and national honour.<sup>1</sup> The reservations most frequently appended at present are those relating to matters of domestic jurisdiction, to past disputes, to interests of third parties, and to special territorial and political interests like the Monroe Doctrine.<sup>2</sup> In most treaties of judicial settlement the effect of these reservations is circumscribed by a provision conferring upon the Permanent Court of International Justice the power to decide whether the dispute is covered by the treaty.<sup>3</sup> Treaties of arbitration or judicial settlement without any reservations are not common, although their number is growing.<sup>4</sup> In cases where no express reservations are mentioned, the scope of the treaty is frequently limited by the provision that only legal (or justiciable) disputes are submitted to adjudication. The effect of that qualification is discussed elsewhere.<sup>5</sup> But there is an increasing number of treaties which, in addition to excluding reservations, ignore the traditional distinction between legal and political disputes either altogether or as a factor limiting the duty of binding settlement.<sup>6</sup> These growing exceptions merely confirm the rule that Inter-

<sup>1</sup> For an example of such a treaty see that between Turkey and Italy of May 30, 1928, which excludes questions of national sovereignty and reserves to each party the right to determine for itself whether that exception applies: *Documents*, 1928, p. 123. See Barandon, *Das System der politischen Staatsverträge seit 1918* (1937), pp. 183-189; Schindler, *Die Schiedsgerichtsbarkeit seit 1914* (1938), pp. 85-94.

<sup>2</sup> Article 36 of the Statute.

<sup>3</sup> Amongst the early treaties not excluding cases concerning independence, honour, and vital interests may be mentioned those between Argentina and Chile in 1902, Denmark and Holland in 1904, Argentina and Italy in 1907, the Central American Republics of Costa Rica, Guatemala, Honduras, Nicaragua, and San Salvador in 1907, Italy and Holland in 1909, Great Britain and Uruguay in 1918, and Venezuela and Uruguay in 1923. See Hudson in *A.J.*, xx. (1926) pp. 25,

26. For an enumeration of treaties of arbitration (or judicial settlement) containing no reservations see *Arbitration and Security*, League Doc. C. 653. M. 216. 1927. V.

<sup>4</sup> See p. 4 (n.).

<sup>5</sup> See, e.g., the treaties between Finland and Norway of February 3, 1926, *L.N.T.S.*, 40, p. 368; Denmark and Czechoslovakia of November 30, 1926, *ibid.*, 47, p. 107. Some treaties, like those between Italy and Switzerland of September 20, 1924, *ibid.*, 33, p. 93, or between Italy and Spain of August 7, 1926, *ibid.*, 47, p. 375, while disregarding the distinction in regard to any limitation of the duty of judicial settlement, authorise the Permanent Court of International Justice to apply rules *ex aequo et bono* in respect of non-legal disputes. See below, § 25a; and see also, for the 'General Act' type of treaties, Lauterpacht, *The Function of Law*, pp. 40-42.

national Law does not as yet recognise a fundamental right of every State to have its disputes with its neighbours decided by the impartial process of the law and a corresponding duty to submit to this process. /

§ 18. Arbitration conceived as a legal process was resorted to in antiquity to some extent by the Greeks<sup>1</sup> and in the later Middle Ages by the various political units which arose on the ruins of the Roman Empire<sup>2</sup>; it was also in frequent use in the relations of the Italian cities<sup>3</sup> in the twelfth and thirteenth centuries and of the Swiss cantons.<sup>4</sup> In spite of the steady development of International Law during the sixteenth, seventeenth, and eighteenth centuries,<sup>5</sup> very few cases of arbitration occurred in that period, and it was not until the end of the eighteenth century that it began to constitute a prominent feature in the pacific settlement of international disputes. The period of modern arbitration begins with the Jay Treaty of November 19, 1794, between Great Britain and the United States. In that Treaty the two States submitted for adjudication by mixed commissions important boundary controversies as well as disputes relating to the exercise of belligerent rights at sea by Great Britain and the observance of the duties of neutrality by the United States.<sup>6</sup> British-American arbitrations constituted in fact the bulk of the international arbitrations during the nineteenth century. They assumed the form mainly of mixed commissions adjudicating upon a number

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<sup>1</sup> See Raeder, *L'arbitrage international chez les Hellènes* (1912); Todd, *International Arbitration among the Greeks* (1913); Ralston, *International Arbitration from Athens to Locarno* (1929), pp. 153-168; Taube in *Hague Recueil*, 1932 (iv.), pp. 5-115.

<sup>2</sup> See Novakovitch, *Les compromis des arbitrages internationaux du XII. au XV. siècles* (1905); Ralston, *op. cit.*, pp. 174-189; Taube, *op. cit.* See also examples in Calvo, iii. pp. 1707-1712; and in Nys, *Les origines du droit international* (1894), pp. 52-61.

<sup>3</sup> Frey, *Das öffentlich-rechtliche Schiedsgericht in Ober-Italien im XII. und XIII. Jahrhundert* (1928).

<sup>4</sup> Usteri, *Das öffentlich-rechtliche*

*Schiedsgericht in der schweizerischen Eidgenossenschaft des XII.-XV. Jahrhunderts* (1925); the same, *Bienne-Bepet Arbitration* (1936), in Moore's *International Adjudications*, Modern Series, vol. ii. And see Waser, *Das öffentliche Schiedsgericht im spätmittelalterlichen Südfrankreich* (1935).

<sup>5</sup> For some examples see Moore, *Arbitrations*, vol. v.

<sup>6</sup> For an account of these arbitrations and of the Jay Treaty in general see Moore, *Adjudications*, vol. i. (throughout). See also the valuable series, *International Adjudications, Ancient and Modern*, edited by John Bassett Moore, since 1929.

of individual claims.<sup>1</sup> But some of them, like the *Alabama* arbitration in 1870,<sup>2</sup> the *Behring Sea* arbitration in 1893<sup>3</sup> and the *British Guiana* arbitration between Great Britain and Venezuela of 1897<sup>4</sup> (which was due to the initiative of the United States), took place before imposing arbitral tribunals and demonstrated the possibility of judicial determination of important political and territorial issues. They paved the way for the Permanent Court of Arbitration which was established in 1899 and which in the first period of its existence was responsible for most of the arbitrations in the first two decades of the twentieth century (see below, §§ 19-25).

At the same time, alongside of the Permanent Court of Arbitration, there were in operation other arbitral agencies in the form of mixed commissions or of tribunals composed of one or more arbitrators. Of these the Alaska Boundary arbitration between Great Britain and the United States,<sup>5</sup> the various Venezuelan arbitrations<sup>6</sup> and the British-American Mixed Claims Tribunal under the Convention of August 1910,<sup>7</sup> were the most important. Similarly, after the establishment of the Permanent Court of International Justice in 1920, there has been a sustained activity of various arbitral tribunals or commissions. They have included, to mention the more important instances, the Mixed Arbitral Tribunals between the Allied Powers and the former Central Powers<sup>8</sup>; similar bodies between the latter and the United

<sup>1</sup> A detailed account of these arbitrations will be found in Moore, *Arbitrations*, vols. i.-v., and *International Adjudications*, Modern Series, edited by Moore (vols. v. and vi. were published in 1933). These arbitrations, from those conducted under the Jay Treaty up to the *Alabama* arbitration in 1870, are also discussed and analysed in the collection edited by Lapradelle and Politis and entitled *Recueil des arbitrages internationaux*, 1798-1858, vol. i., and 1858-1872, vol. ii. (1924). See also Jessup, *The United States and Treaties for the Avoidance of War* (International Conciliation Pamphlet No. 239, April 1928); Hill, *British Arbitration Policies* (*ibid.*, No. 257, February

1930); and Headlam-Morley, *Studies in Diplomatic History* (1930), pp. 10-50.

<sup>2</sup> See below, § 335.

<sup>3</sup> For a short account and further references see Lauterpacht, *Analogies*, §§ 98, 99.

<sup>4</sup> *Ibid.*, §§ 100-103.

<sup>5</sup> *Ibid.*, §§ 104-106.

<sup>6</sup> See in particular Ralston, *Report of the French-Venezuelan Mixed Claims Commission of 1902* (1906), and the same, *Venezuelan Arbitrations of 1903* (U.S. Senate Doc. 316, 58th Congress, 2nd Session; 1904).

<sup>7</sup> See Nielsen, *American and British Claims Arbitration (under the Special Agreement of August 18, 1910)* (1926).

<sup>8</sup> See below, § 102.

States<sup>1</sup>; the Upper Silesian Arbitral Tribunal between Germany and Poland<sup>2</sup>; a number of claims commissions between Mexico and other States, in particular the United States, Great Britain, France, and Germany<sup>3</sup>; territorial disputes like those between Colombia and Venezuela decided in 1922 by the Swiss Federal Council,<sup>4</sup> between Chile and Peru concerning the plebiscite territory in Tacna Arica decided in 1925 by the President of the United States,<sup>5</sup> and between Guatemala and Honduras decided in 1933 by a tribunal presided over by Mr. Hughes, the Chief Justice of the United States<sup>6</sup>; the claims of Great Britain against Spain in connection with the events in Morocco, decided in 1924 by Judge Huber<sup>7</sup>; various arbitral decisions in connection with the work of the Reparation Commission<sup>8</sup>; and a number of cases decided by the Permanent Court of Arbitration, which is still in existence.<sup>9</sup> The latter tribunal, the establishment of which marked a new epoch in the history of international arbitration, was the principal institution for arbitral settlement in the fifteen years which preceded the World War; its organisation has, together with the Draft Convention of 1907 for establishing a Court of Arbitral Justice,<sup>10</sup> the project of an International Prize Court<sup>11</sup> and the Central American Court of Justice,<sup>12</sup> in many respects served as a model for the Statute of the Permanent Court of International Justice. It is therefore convenient to give some account of the provisions relating

<sup>1</sup> See Kiesselbach, *Probleme und Entscheidungen der deutsch-amerikanischen Schadens-Kommission* (1927) (part of this book is available in an English translation, published in 1930); Witenberg, *Commission Mixte des Réclamations Germano-Américaine*, 2 vols. (1938).

<sup>2</sup> As to which see Kaeckenbeeck in *Grotius Society*, xxi. (1936), pp. 27-44; Schindler, *op. cit.*, pp. 33-39.

<sup>3</sup> The decisions of these Commissions, as well as of practically all other arbitral bodies since 1919, are reported in the *Annual Digest*, where further references will be found. And see Feller, *The Mexican Claims Commissions* (1935); Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico*

*under the Convention of September 8, 1923* (1938).

<sup>4</sup> *Annual Digest*, 1919-1922, Case No. 54.

<sup>5</sup> *Ibid.*, 1925-1926.

<sup>6</sup> See Fisher in *A.J.*, xxvii. (1933) pp. 403-427; *Annual Digest*, 1933-1934, Case No. 46.

<sup>7</sup> *Annual Digest*, 1923-1924.

<sup>8</sup> *Ibid.*, 1923-1928. See also *Entscheidungen des internationalen Schiedsgerichts zur Auslegung des Dawes-Plans*, ed. by Schoch (1927-1929); Kunckel, *Die Schiedsgerichtsbarkeit im Reparationsrecht nach dem Sachverständigenplan* (1931).

<sup>9</sup> See below, § 25aa.

<sup>10</sup> See below, § 25ab.

<sup>11</sup> See below, § 438.

<sup>12</sup> See below, § 25ab.

to the Permanent Court of Arbitration. These provisions were laid down by the First Hague Conference; they were then enlarged by the Second Hague Conference in the Convention for the Pacific Settlement of International Disputes.<sup>1</sup>

Arbitration according to the Hague Convention.

§ 19. Of the ninety-seven articles of the Hague Convention for the Pacific Settlement of International Disputes, no fewer than fifty-four—namely, Articles 37-90—deal with arbitration in four chapters, headed ‘On Arbitral Justice,’ ‘On the Permanent Court of Arbitration,’ ‘On Arbitral Procedure,’ and ‘On Arbitration by Summary Procedure.’

The Convention imposed no obligation on the signatory Powers to submit any difference to arbitration. Even differences of a judicial character, including those regarding the interpretation or application of treaties (for the settlement of which the signatory Powers, in Article 38, acknowledged arbitration to be the most efficacious and at the same time the most equitable method), had not necessarily to be submitted to arbitration.<sup>2</sup>

<sup>1</sup> See Hershey, Nos. 314-320; Ullmann, §§ 155-156; Fauchille, §§ 955 (5) and 955 (23); Nys, ii. pp. 568-572; Despagnet, Nos. 736-746 *bis*; Mérignhac, i. pp. 486-540; Lawrence, § 221; Strupp, *Wört.*, ii. 454-474; De Louter, ii. 150-196; Rolin, §§ 72-92; Hyde, ii. §§ 568-571; Holls, *The Peace Conference at The Hague* (1900); Martens, *La Conférence de la Paix à la Haye* (1900); Mérignhac, *La Conférence internationale de la Paix* (1900); Fried, *Die zweite Haager Konferenz* (1908); Meurer, i. pp. 299-372; Scott, *Conferences*, pp. 286-385; Higgins, pp. 164-179; Lémonon, pp. 188-219; Nippold, i. pp. 36-231; Wehberg, *Kommentar*, pp. 46-164; Tettenhorn, *Das Haager Schiedsgericht* (1911); Schücking, *Der Staatenverband der Haager Konferenzen* (1912), pp. 39-66; Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit* (1914); Pillet, *Les Conventions de la Haye* (1918), pp. 1-207 (esp. 113-207); Gossweiler, *L'arbitrage international avant 1914 et après 1919* (1923), pp. 17-92; Politis, *La Justice Internationale* (1924), pp. 100-127; Kohler in *Z.V.*, vii. (1913) pp. 113-122;

Myers in *A.J.*, viii. (1914) pp. 769-801 and x. (1916) pp. 270-311; Wehberg in *Hague Recueil*, 1931 (iii.), pp. 543-594, 623-645; Hudson in *A.J.*, xxvi. (1933) pp. 440-460, and *Permanent Court*, pp. 3-29.

<sup>2</sup> Although it was not possible to agree upon the inclusion in Convention I. of any stipulation embodying compulsory arbitration for a number of differences, the principle itself was fully recognised, and the Final Act of the Second Peace Conference included, therefore, a declaration that the Conference ‘is unanimous (1) in admitting the principle of compulsory arbitration; (2) in declaring that certain disputes, in particular those relating to the interpretation and application of international agreements, may be submitted to compulsory arbitration without any restriction.’ See Scott, *Conferences*, pp. 319-385, where the proceedings of both the First and Second Peace Conferences concerning compulsory arbitration are sketched in a masterly way. See also Scott, *Reports to the Hague Conferences of 1899 and 1907* (1917), pp. 368-454.

§ 20. According to Article 52, the conflicting States which resort to arbitration sign a special Act, the *compromis*, which clearly defines :—the subject of the dispute ; the time allowed for appointing the arbitrators ; the form, order, and time in which the communications referred to in Article 63 must be made ; the sum which each party must deposit in advance to defray expenses ; the manner of appointing arbitrators (if there be occasion) ; any special powers which may eventually belong to the Tribunal ; where it shall meet ; the languages to be used ; and any special conditions upon which the parties may agree (Articles 53-54). The parties may agree to have recourse to the Permanent Court of Arbitration itself,<sup>1</sup> but they may also assign the arbitration to one or several arbitrators chosen by them, either from the members of the Permanent Court of Arbitration, or otherwise (Article 55). If the *compromis* is settled by a commission, the International Bureau of the Court at The Hague is authorised to put its offices and its staff at the disposal of parties which have preferred to bring their dispute before arbitrators other than the Permanent Court of Arbitration (Article 47).

§ 21. The parties may agree upon such rules of arbitral procedure as they like. If they fail to stipulate special rules of procedure, chapter iii. of Convention I. contains a code of rules (Articles 51 to 85) which are applicable, whether the parties have brought their case before the Permanent Court of Arbitration or have chosen other arbitrators.

§ 22. The arbitral award is given after deliberation behind closed doors, and the proceedings remain secret ; the members of the Tribunal vote, and the majority of the votes makes the decision of the Tribunal<sup>2</sup> (Article 78).

§ 23. The award, when duly pronounced and notified to the agents of the parties, decides the dispute finally and without appeal (Article 81). Any dispute arising between the parties as to its interpretation or execution must, in default of an agreement to the contrary, be submitted to

<sup>1</sup> See below, § 25aa.

nationals of one of the litigant States appointed as arbitrators see *B.Y.*, 1923-1924, at p. 161.

<sup>2</sup> For instances of dissent by

the Tribunal which pronounced it (Article 82). The parties may, however, stipulate beforehand in the *compromis* for the right to demand a revision of the award.

Award  
binding  
upon  
Parties  
only.

§ 24. The award is binding only upon the parties to the proceedings. But when there is a question of interpreting a convention to which States other than the States at variance are parties, the conflicting States have to inform all the contracting Powers in good time. Each has a right to intervene in the case before the Tribunal, and, if one or more avail themselves of this right, the interpretation contained in the award is binding upon them also (Article 84).

Costs of  
Arbitra-  
tion.

§ 25. Each party pays its own expenses, and an equal share of those of the Tribunal (Article 85).<sup>1</sup>

Arbitra-  
tion by  
Summary  
Pro-  
cedure.

§ 25a. With a view to simplifying and expediting arbitration in disputes of minor importance, chapter iv. of Convention I. contains a body of provisions (Articles 86 to 90) for arbitration by summary procedure.

Organisa-  
tion  
of Perma-  
nent  
Court of  
Arbitra-  
tion.

§ 25aa. The preceding §§ 19 to 25a relate to arbitration under Hague Convention I. in general, and it will have been noticed that under Article 55 of that Convention (1907) the parties may either choose one or more arbitrators as they please, or they may have recourse to the Permanent Court of Arbitration, which in compliance with Articles 20 to 29 of Convention I. of 1899 the signatories proceeded in 1900 to organise at The Hague.† This organisation comprises three distinct bodies—namely, the Permanent Administrative Council of the Court, the International Bureau of the Court, and the Court of Arbitration itself. [But a fourth body must also be distinguished—namely, the tribunal to be constituted for the decision of each case. Articles 20 to 29 were replaced by Articles 41 to 50 of the corresponding convention produced by the Second Hague Peace Conference of 1907.

The Per-  
manent  
Council.

(i) The Permanent Council (Article 49) consists of the diplomatic envoys of the contracting Powers accredited to Holland, and the Dutch Secretary for Foreign Affairs, who acts as president of the Council. The task of the Council is

<sup>1</sup> See details in Wehberg, *Kommentar*, pp. 155-158.

to control the International Bureau of the Court, and to decide all questions of administration with regard to the business of the Court.

(ii) The International Bureau (Article 43) serves as the registry for the Court, and is the intermediary for communications relating to the meetings of the Court. It has the custody of the archives, and the conduct of all the administrative business of the Court. The International Bureau.

(iii) The Court of Arbitration (Article 44) consists of a large number of individuals 'of recognised competence in questions of International Law, enjoying the highest moral reputation,' selected and appointed by the contracting Powers. Each Power may appoint not more than four members; two or more Powers may unite in the appointment of one or more members; and the same individual may be appointed by different Powers. Every member is appointed for a term of six years, but his appointment may be renewed. The Court thus constituted is competent for all cases of arbitration, unless there shall be an agreement between the parties for a special tribunal of arbitrators not selected from the list of the members of the Court (Article 42). The Court of Arbitration.

(iv) The Court of Arbitration does not as a body decide the cases brought before it; a Tribunal is created for every special case by selection of a number of arbitrators from the list of the members of the Court. This Tribunal (Article 45) may be created directly by agreement of the parties. The Convention lays down detailed rules for the case of the parties being unable to reach an agreement on the matter. The members of the Tribunal must be granted the privileges of diplomatic envoys when discharging their duties outside their own country (Article 46). The expenses of the Tribunal are paid by the parties in equal shares, and each party pays its own expenses (Article 85). The Deciding Tribunal.

The following awards<sup>1</sup> have hitherto been given by the Permanent Court of Arbitration:

(1) On October 14, 1902, in the case of *The United States of America v. Mexico*, concerning the Pious Fund of the Californias.<sup>2</sup>

<sup>1</sup> See Wilson, *The Hague Arbitration Cases* (1915), and Scott, *The Hague Court Reports* (1916).

<sup>2</sup> Martens, *N.E.G.*, 2nd ser., xxxii. p. 193.



(2) On February 22, 1904, in the case of *Germany, Great Britain, and Italy v. Venezuela*, concerning certain claims of their subjects.<sup>1</sup>

(3) On May 22, 1905, in the case of *Germany, France, and Great Britain v. Japan*, concerning the interpretation of Article 18 of the treaty of April 4, 1896, and of other treaties.<sup>2</sup>

(4) On August 8, 1905, in the case of *France v. Great Britain*, concerning the Muscat Dhows.<sup>3</sup>

(5) On May 22, 1909, in the case of *Germany v. France*, concerning the Casa Blanca incident.<sup>4</sup>

(6) On October 23, 1909, in the case of *Norway v. Sweden*, concerning the question of their maritime frontier.<sup>5</sup>

(7) On September 7, 1910, in the case of *The United States of America v. Great Britain*, concerning the North Atlantic Fisheries.<sup>6</sup>

(8) On October 25, 1910, in the case of *The United States of America v. Venezuela*, concerning the claims of the Orinoco Steamship Co.<sup>7</sup>

(9) On February 24, 1911, in the case of *France v. Great Britain*, concerning the British-Indian Savarkar.<sup>8</sup>

(10) On May 3, 1912, in the case of *Italy v. Peru*, concerning the claim of the brothers Canevaro.<sup>9</sup>

(11) On November 11, 1912, in the case of *Russia v. Turkey*, concerning interest claimed on behalf of Russians for delay in payment of compensation for damages sustained during the Russo-Turkish War in 1877-1878.<sup>10</sup>

(12 and 13) On May 6, 1913, in the cases of *France v. Italy*, concerning the seizure of the French vessels, *Carthage* and *Manouba*, during the Turco-Italian War in 1911.<sup>11</sup>

(14) On June 25, 1914, in the case of *The Netherlands v. Portugal*, concerning a boundary in the island of Timor.<sup>12</sup>

(15) On September 2 and 4, 1920, in the case of *Great Britain, France, and Spain v. Portugal*, concerning the claims of British, French, and Spanish nationals on account of the expropriation of their property by Portugal.<sup>13</sup>

<sup>1</sup> Martens, *N.R.G.*, 3rd ser., i. p. 57.

<sup>2</sup> Martens, *N.R.G.*, 2nd ser., xxxv. p. 376.

<sup>3</sup> Martens, *N.R.G.*, 2nd ser., xxxv. p. 356.

<sup>4</sup> Martens, *N.R.G.*, 3rd ser., ii. p. 19.

<sup>5</sup> Martens, *N.R.G.*, 3rd ser., iii. p. 85.

<sup>6</sup> Martens, *N.R.G.*, 3rd ser., iv. p. 89.

<sup>7</sup> Martens, *N.R.G.*, 3rd ser., iv. p. 79.

<sup>8</sup> Martens, *N.R.G.*, 3rd ser., iv. p. 744.

<sup>9</sup> Martens, *N.R.G.*, 3rd ser., vi. p. 54.

<sup>10</sup> Martens, *N.R.G.*, 3rd ser., vi. p. 653.

<sup>11</sup> Martens, *N.R.G.*, 3rd ser., viii. pp. 174 and 179. The French and Italian Governments had also submitted to arbitration the case of the seizure of the vessel *Tavignano*. But no final award was given in this case, as the Governments at issue agreed to settle the matter out of court. See Martens, *N.R.G.*, 3rd ser., viii. p. 172.

<sup>12</sup> *A.J.*, ix. (1915) p. 240.

<sup>13</sup> *A.J.*, xv. (1921) pp. 99, 102-105.

(16) On October 11, 1921, in the case of *France v. Peru*, concerning certain claims of a French company against Peru.<sup>1</sup>

(17) On October 13, 1922, in the case of *Norway v. United States of America*, upon certain requisitions by the American Government of ships under construction in the United States for Norwegian subjects during the World War.<sup>2</sup>

(18) On April 4, 1928, in the case between the United States and Holland, concerning the sovereignty over the *Island of Palmas (Miangas)*.<sup>3</sup>

(19) On June 9, 1931, in the *Chevreau Claim* between France and Great Britain, concerning the arrest of a French subject by British authorities in Persian territory (occupied by Great Britain with the permission of the Persian Government) during the World War.<sup>4</sup>

(20) On July 18, 1932, in the cases of the S.S. *Kronprins Gustaf Adolf* and S.S. *Pacific* between Sweden and the United States, concerning the compensation for the detention of these ships belonging to a Swedish corporation during the World War.<sup>5</sup>

The Permanent Court of Arbitration has not been superseded by the Permanent Court of International Justice, which we shall describe later. The two instruments are at work side by side, and are likely so to continue, at any rate so long as there are States which are parties to the constitution of the Court of Arbitration and which have not yet adopted the Statute of the Court of Justice—for instance, the United States of America.

## VI

### JUDICIAL SETTLEMENT

#### THE PERMANENT COURT OF INTERNATIONAL JUSTICE

On the question of an International Court of Justice generally:—Nys, ii. pp. 577-580—De Louter, ii. pp. 192-196—Scott, *The Hague Peace Conferences* (1909), i. pp. 465-511 and 423-464, and in *A.J.*, v. (1911) pp.

<sup>1</sup> *A.J.*, xvi. (1922) p. 480.

<sup>2</sup> *A.J.*, xvii. (1923) pp. 362-399, and comment in *A.J.*, xvii. (1923) pp. 287-290, and *B.Y.*, 1923-1924, pp. 159-162.

<sup>3</sup> *A.J.*, xxii. (1928) pp. 867-912; Versfelt, *The Miangas Arbitration* (1933); Jessup in *A.J.*, xxii. (1928) pp. 735-752; F. de Visser in *R.I.*, 3rd ser., x. (1929) pp. 735-762.

<sup>4</sup> *A.J.*, xxvii. (1933) pp. 153-182; Hudson, *ibid.*, xxvi. (1932) pp. 804-807.

<sup>5</sup> *A.J.*, xxvi. (1932) pp. 834-903; O'Neil, *ibid.*, xxvi. (1932) pp. 720-734. All the awards of the Permanent Court of Arbitration, except the last two awards, are printed in Scott, *Hague Court Reports* (1st ser., 1916, and 2nd ser., 1932).

302-324 and vi. (1912) pp. 316-358—Oppenheim, *The Future of International Law* (1911) (English translation (1921), §§ 50-66)—*A.S. Proceedings*, vi. (1912) pp. 144-178—Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit* (1914), pp. 137-146—Scott, *An International Court of Justice* (1916), and *The Status of the International Court of Justice* (1916)—Wehberg, *The Problem of an International Court of Justice* (1918) (translation into English by Fenwick)—Gregory in *A.J.*, ii. (1908) pp. 458-475—Reinsch, *ibid.*, v. (1911) pp. 604-614—Lehr in *R.I.*, 2nd ser., xvi. (1914) pp. 137-156—Hyde, ii. §§ 572-576.

On the proceedings leading to the establishment of the Permanent Court of International Justice :—Altamira, *El proceso ideológico del proyecto de Tribunal de Justicia Internacional* (1920)—Morellet, *L'organisation de la Cour Permanente de Justice Internationale* (1921)—Bourgeois, *L'œuvre de la Société des Nations* (1923), pp. 159-214—Politis, *La Justice Internationale* (1924), pp. 127-129, 134-139, 155-193—Scott, *Sovereign States and Suits before Arbitral Tribunals and Courts of Justice* (1925), pp. 215-250—Garner, *Developments*, pp. 652-707—Schenk von Stauffenberg, *Statut et Règlement de la Cour Permanente de Justice Internationale* (1934)—Hudson, *Permanent Court*, pp. 81-181—Proceedings of the Advisory Committee of Jurists (The Hague, 1920)—Documents presented to the Committee relating to existing plans for the establishment of a Permanent Court of International Justice, and Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court (League of Nations, Geneva, 1921).

On the Court itself as established :—Hall, § 1196—Fauchille, §§ 970 (30)-970 (51)—Liszt, § 54—Schücking und Wehberg, pp. 535-567—Hudson, *The Permanent Court of International Justice* (1934 ; the leading treatise on the subject) ; the same, *The World Court, 1921-1934* (4th ed., 1934) ; and see the annual articles by the same author in the *American Journal of International Law* surveying the work of the Court—Fachiri, *The Permanent Court of International Justice* (2nd ed., 1932)—Bustamante, *El Tribunal Permanente de Justicia Internacional* (1925) (translated into English by Read as *The World Court* (1925))—Ch. de Visscher, *La Cour Permanente de Justice Internationale* (1923)—Salvioli, *La Corte Permanente di Giustizia Internazionale* (1924)—Moore, *The United States and the Permanent Court of International Justice* (1923), and *The Permanent Court of International Justice* (1924), both in *International Conciliation Pamphlets*, Nos. 186 and 197, and Moore, *Current Illusions*, pp. 96-181—Gonsiorowski, *Société des Nations et problème de la Paix*, i. (1927) pp. 383-508—Francoville, *L'œuvre de la Cour Permanente de Justice Internationale*, 2 vols. (1928)—Ralston, *International Arbitration from Athens to Locarno* (1929), pp. 299-341—Lindsay, *The International Court* (1931)—Sir Ernest Pollock (Lord Hanworth) in *Cambridge Law Journal*, 1921, pp. 29-41—Lord Phillimore in *Grotius Society*, vi. (1921) pp. 89-98—Root in *A.S. Proceedings*, 1923, pp. 1-15—Salvioli in *Hague Recueil*, 1926 (ii.), pp. 5-113—Hammarskjöld in *Bulletin*, xvii. (1927) pp. 267-288, and in *Journal of the Royal Institute of International Affairs*, ix. (1930) pp. 467-497—Morellet in *Répertoire de droit international*, v. (1929) pp. 274-323—Caloyanni in *Hague Recueil*, 1931 (iv.), pp. 655-785—Ch. de Visscher in *Acta Scandinavica*,

iv. (1934) pp. 147-165—Bruns in *Hague Recueil*, 62 (1937) (iv.), pp. 551-665.

For literature on the development of International Law by the Court see below, p. 63, n. 1.

For a periodical review of the work of the Court see Series E of the publications of the Court.

§ 25ab. Valuable as has been, and may continue to be, the Permanent Court of Arbitration at The Hague, it must be pointed out that it is not a real court of justice as that term is ordinarily understood. For, in the first place, it is not itself a deciding tribunal, but only a list of names, out of which the parties in each case select, and thereby constitute, the court. Secondly, it was feared<sup>1</sup> that occasions may occur on which a court of arbitration may feel itself free rather to give an award *ex aequo et bono*, which more or less pleases both parties, than to decide the conflict in a judicial manner by simply applying legal rules. Thirdly, since in conflicts to be decided by arbitration the arbitrators are selected by the parties on each occasion, there are in most cases different individuals acting as arbitrators, with the result that there is no continuity in the administration of justice.

Proposals  
for an  
International  
Court of  
Justice.

For these reasons it was long felt that it would be of the greatest value to institute a real international court of justice, consisting of a number of judges in the technical sense of the term, who are appointed once for all, and would have to act in each case that the parties chose to bring before the court.<sup>2</sup> Such a court would not only base its decision on purely legal deliberations. It would secure continuity in the administration of international justice, because it would attach due importance to its former decisions.<sup>3</sup> The Second Hague Peace Conference of 1907 discussed the question of creating such a court, but only produced the

<sup>1</sup> It has been pointed out above that such apprehension found in fact no support in the history of international arbitration. See below, § 25ae.

<sup>2</sup> Different from this court would be an international court of justice for the settlement of money claims of private individuals against foreign

States, as proposed by Wehberg, *Ein internationaler Gerichtshof für Privatklagen* (1911); see also Bar in *Z.I.*, vii. (1913) pp. 429-437; Hurst in *B.Y.*, 1925, pp. 61-67. And see below, p. 51, n. 2, on access of individuals to international tribunals.

<sup>3</sup> See Article 59 of the Statute of the Court, below, § 25ae.

draft of a convention concerning the subject, which spoke of the creation of a 'Court of Arbitral Justice.'<sup>1</sup>

The  
Covenant  
and the  
Court.

§ 25ac. The opportunity for creating a real court of international justice came at the close of the World War. The preamble of the Covenant of the League enumerates amongst the means of securing its objects 'the firm establishment of the understandings of international law as the actual rule of conduct among Governments,' and 'the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another'; and accordingly Article 14 provides that 'The Council shall formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.'

In due course the Council in February 1920 appointed an Advisory Committee of distinguished jurists (including Mr. Elihu Root, although the United States had not ratified the Covenant<sup>2</sup>), and charged them with the duty of preparing a Draft Scheme<sup>3</sup> for the establishment of such a

<sup>1</sup> See Hudson, *Permanent Court*, pp. 77-81. In the same year, 1907, Costa Rica, Guatemala, Honduras, Nicaragua, and San Salvador established the 'Central American Court of Justice' at Cartago, consisting of five judges. (See *A.J.*, ii. (1908), Suppl., p. 231.) This court was never of more than local importance, and it came to an end in 1918; but it is of interest as having been the first of its kind. See *A.J.*, xii. (1918) p. 380; Bustamante, *The World Court*, pp. 68-78; Eyma, *La Cour de Justice Centre-Américaine* (1928); and, for exhaustive survey, Hudson in *A.J.*, xxvi. (1932) pp. 759-786, and *Permanent Court*, pp. 34-67. In place of this court a new court has been foreshadowed, but never actually established, by a Convention of February 7, 1923. See Hudson, *Per-*

*manent Court* (1934), pp. 63-66.

<sup>2</sup> Upon analogies presented by the American Supreme Court see Balch, *A World Court in the Light of the United States Supreme Court* (1918); H. A. Smith, *The American Supreme Court as an International Tribunal* (1920); Bellot, *The Constitution of the Supreme Court of the United States and the Permanent Court of International Justice* (Grotius Society's Texts, No. 8) (1921); Warren, *The Supreme Court and Sovereign States* (1924), and International Conciliation Pamphlet No. 289 (April 1933); Rosenberg in *Columbia Law Review*, xxv. (1925) pp. 783-799. As to the subsequent attitude of the United States to the Court see below, p. 51, n. 4.

<sup>3</sup> Printed in Fachiri (1st ed.), pp. 289-299.

court, which, with amendments, of which one of great importance will be referred to later,<sup>1</sup> was, after examination by the Council and by a Committee of the Assembly, approved by the Assembly on December 3, 1920. But the Statute became binding upon the members of the League only as the result of the signature and ratification of the Protocol of Signature of the Statute of December 16, 1920.<sup>2</sup> The Scheme, and 'the Statute'<sup>3</sup> as it became when adopted and will be referred to hereafter, are divided into three chapters, which it will be convenient to adopt as the basis of our exposition: (i) Organisation; (ii) Competence; (iii) Procedure.

§ 25aca. Unlike the Covenant of the League, the Statute of the Court contains no provision for its amendment. In view of its origin, and having regard to the general rule of International Law that, in the absence of a provision to the contrary, a treaty can be amended only with the consent of all its parties, it would appear that both approval of the Assembly and unanimous consent of the parties to the Protocol of Signature of 1920 are required for the amendment of the Statute. This was the view taken in 1928 and 1929 when a Committee of Jurists, appointed by the Council in virtue of a resolution of the Assembly of September 20, 1928,<sup>4</sup> was entrusted with the task of considering any changes in the Statute rendered necessary in the light of past experience. The Committee proposed a number of changes, the most important of which aimed at increasing the number of judges, abolishing the post of deputy-judge, adding a, hitherto absent, provision for the case of resignation of judges, rendering it impossible for judges to engage in any occupation of a professional nature,<sup>5</sup> constituting the Court as being permanently in session except during

The Revision of the Statute.

<sup>1</sup> See below, § 25ae (p. 54).

<sup>2</sup> For text see Fachiri, p. 359; Hudson, *Permanent Court*, p. 579.

<sup>3</sup> Treaty Series, No. 23 (1923), Cmd. 1981; *A.J.*, xvii. (1923), Suppl., pp. 55-69; Fachiri, pp. 348-359; Hudson, *Permanent Court*, pp. 578-609, and in *World Court Reports*, i. pp. 18-28, and *International Legislation*, i. pp. 530-545. The Articles

referred to in §§ 25ad-25af below are the Articles of the Statute of the Court, unless otherwise mentioned.

<sup>4</sup> *Records of the Ninth Assembly, Plenary Meetings*, p. 112.

<sup>5</sup> Cuba subsequently opposed that particular amendment. No adequate official explanation was given of the Cuban attitude.

judicial vacations, and regularising the rendering of Advisory Opinions. No attempt was made to amend the Statute by making provision for its further amendment by a process less cumbrous than the unanimous consent of the States parties to it. The proposals of the Committee were submitted in September 1929 to a Conference of representatives of States parties to the Statute, and were approved by it with some minor modifications. The Conference drew up a Protocol of Revision of the Statute for signature and ratification by the parties to the Protocol of 1920. The Tenth Assembly then adopted on September 14, 1929, the amendments of the Statute and the draft Protocol. Owing, originally, to the opposition of Cuba and, subsequently, to the failure of some of the signatories of the Protocol of 1920 to ratify the Protocol of Revision, the Protocol of Revision did not enter into force until February 1, 1936.<sup>1</sup> In the meantime, the provisions of the Protocol as to the increase of the number of judges were, in accordance with Article 3 of the Statute, given effect by a resolution of the Assembly in 1930; while those relating to the permanency of the sessions of the Court were embodied in the Rules of the Court as revised in 1931.<sup>2</sup>

Organisa-  
tion of the  
Court.

§ 25*ad*. After making it clear that the Court is in addition to the Permanent Court of Arbitration and to any other special tribunal of arbitration to which States may choose to submit their disputes (Article 1), the Statute proceeds to deal with the character, the number, the mode of election, and the tenure of office of the judges and deputy-judges. The Court is to be 'composed of a body of independent

<sup>1</sup> See *Records of the Sixteenth Assembly, 1935, Plenary Meetings*, pp. 94, 124; *Off. J.*, 1936, pp. 118, 266; Hudson in *A.J.*, xxx. (1936) pp. 273-279.

<sup>2</sup> For a detailed and lucid account of the work of revision of the Statute see Publications of the Court, Series E, No. 6, pp. 56-92. In the subsequent issues of that Series there will be found an account of the developments after 1930. See also Pereira da Silva, *La réforme de la Cour Permanente de Justice Internationale, le*

*Protocole de 1920, et le veto de Cuba* (1931); Fachiri in *B.Y.*, 1930, pp. 92-99; Hudson in *A.J.*, xxv. (1931) pp. 15-21, and *Permanent Court*, pp. 102-208; Cassin in *R.G.*, xxxvi. (1929) pp. 377-396; Raestad in *R.I. (Paris)*, iii. (1929) pp. 340-379; Hammarskjöld in *R.I.*, 3rd ser., ix. (1928) pp. 667-689; Paul de Vineuil, *ibid.*, xi. (1930) pp. 601-621; Anon. in *R.I. (Paris)*, iv. (1929) pp. 5-66. For the text of the Protocol of Revision see Treaty Series (1930) No. 38.

judges, elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law' (Article 2).<sup>1</sup> The number was originally eleven judges and four deputy-judges (Article 3). The number of judges was increased by the Assembly in 1930 to fifteen, and the elections in that year took place on that basis. Four deputy-judges were also elected on that occasion, but in view of the anticipated coming into force of the revision of the Statute the hope was expressed that they would not be called upon to serve. Since then, there has been no occasion to have recourse to their services.

The draft Convention for a Court of Arbitral Justice in 1907 already referred to<sup>2</sup> failed to become law mainly by reason of the difficulty of devising a method of electing judges which would satisfy both the large and the small States. This danger was obviated in 1920 by the adoption of what has been called the 'Root-Phillimore' plan, which, by entrusting the election of the Court both to the Council (on which at that time the Great Powers were expected to form a majority) and to the Assembly, took account of the claims of the Great Powers and of the small States.<sup>3</sup>

On the one hand, judges must not be regarded as the representatives of the States of which they happen to be nationals; on the other, it is necessary, in order to establish confidence in the Court, for every State to know that there is at any rate one member of the Court who is familiar with

<sup>1</sup> This insistence upon professional qualifications should be contrasted with the qualifications of the members of the panel of the Permanent Court of Arbitration: see above, § 25*aa* (iii). The Conference of the Signatories of the Statute, held in 1929, adopted a resolution, subsequently approved by the Assembly of that year, recommending that 'the candidates nominated by the national groups should possess recognized practical experience in international law and that they should be at least able to read both the official languages of

the Court and to speak one of them': Series E, No. 6, p. 90.

<sup>2</sup> See above, § 25*ab*.

<sup>3</sup> This consideration has now largely ceased to operate, seeing that the Permanent Members no longer possess a majority on the Council. See *B.Y.*, 1931, pp. 126-130. It is doubtful whether the present method makes possible a conscientious, thorough, and fully responsible process of selecting the personnel of one of the most important organs of the international community.



the general principles and outlook of its legal system. Accordingly, Article 2 states that they are to be elected 'regardless of their nationality,' but Article 9 provides that the whole body 'should represent the main forms of civilisation and the principal legal systems of the world.'<sup>1</sup>

In pursuance of the 'Root-Phillimore' plan, which involves two stages—nomination and election—the candidates are first 'nominated by the national groups in the (Permanent) Court of Arbitration,' additional national groups being formed to comprise any members of the League not represented in that Court (Article 4), no group 'nominating more than four persons, not more than two of whom shall be of their own nationality' (Article 5); and 'each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law' (Article 6).<sup>2</sup>

A list of candidates having been prepared in this way, the Assembly and the Council proceed 'independently of one another,' but in effect simultaneously, to elect both the judges and the deputy-judges (Article 8), no person being considered as elected who does not obtain an absolute majority of votes *both* in the Assembly and in the Council; and if two or more nationals of the same State should obtain a majority of the votes of both these bodies, only the eldest of these is considered as elected (Article 10).<sup>3</sup>

<sup>1</sup> And see below, p. 67, as to 'national' judges.

<sup>2</sup> There is no legal obligation to consult these bodies (see *Report of the Committee of Jurists of 1920*, p. 707), and the recommendation has in fact remained a dead letter.

<sup>3</sup> On the question whether a person possessing the nationality of a British dominion could be elected in addition to a national of the United Kingdom and Northern Ireland see Pollak in *A.J.*, xx. (1926) pp. 714-725; Baker, *The Present Juridical Status of the British Dominions in International Law* (1929), pp. 102-105. And see the Minutes of the Committee of Jurists on the revision of the Statute

for the suggestion by Sir Cecil Hurst that Article 31 of the Statute (see below, p. 67) 'should be interpreted to mean that it did not exclude the right of a Dominion to appoint a judge *ad hoc* even though an English judge should also be a member': *Minutes*, Doc. C. 166. M. 66. 1929. V., pp. 70, 71, 84-87. The suggestion was not adopted. But, clearly, such an appointment would have to be made if the existing reservations as to inter-imperial disputes (see below, p. 56) were to be abandoned, and if a dispute were submitted to the Court under the Optional Clause, or if a dispute were voluntarily submitted, notwithstanding the reservation.

If necessary, three meetings of each body must be held, and, failing their coincidence in electing the same persons even after three meetings, a joint conference between the two bodies takes place for the purpose of removing what would otherwise be a deadlock. (Such a joint conference became in fact necessary at the first election in 1921.<sup>1</sup>) Failing agreement between the Council and the Assembly by this means, the judges and deputy-judges already appointed proceed to fill up the remaining vacancies from among persons who have obtained votes either in the Council or in the Assembly (Article 12).

The members of the Court are elected for nine years,<sup>2</sup> and are re-eligible (Article 13), and when engaged on the business of the Court they enjoy diplomatic privileges and immunities (Article 19).<sup>3</sup> They elect their President<sup>4</sup> and Vice-President, and appoint their Registrar (Article 21). The seat of the Court is at The Hague (Article 22).

Normally the Court consists of the eleven judges; and if a court of eleven members cannot be constituted, a quorum of nine will suffice (Article 25).<sup>5</sup> Judges and (when actually performing their duties) deputy-judges and judges *ad hoc* (see below, p. 67) receive remuneration; not from the States whose nationals they are—that would be *pessimi exempli*—but out of the funds of the Court, which are supplied by the League (Articles 32, 33).<sup>6</sup> No judge or deputy-judge, when actively performing his duties in the

<sup>1</sup> *Reports of the Second Assembly, Plenary Meetings*, pp. 290-291; Fachiri, pp. 38-40; Hudson in *A.J.*, xxiv. (1930) pp. 718-727.

<sup>2</sup> Owing to the war which broke out in Europe, the Twentieth Assembly decided in December 1939 not to proceed with the renewal of the membership of the Court at the expiration of the nine-year term at the close of the year 1939, and to postpone the election to another session.

<sup>3</sup> Secretan, *Les immunités diplomatiques des Représentants, des États membres et des Agents de la Société des Nations* (1928), pp. 56, 57; Anzilotti in *Rivista*, 3rd ser., viii. (1928) pp. 531-535; Deák in *R.I.*,

3rd ser., ix. (1928) pp. 187, 545-549; Preuss in *A.J.*, xxv. (1931) pp. 707-710; Genet in *R.G.*, xiv. (1933) pp. 254-281; Aubain in *R.I.*, 3rd ser., xv. (1934) pp. 129-143; Hammarskjöld in *Hague Recueil*, 56 (1936) (ii.), pp. 112-206.

<sup>4</sup> Lienau, *Stellung und Befugnisse des Präsidenten des Ständigen Internationalen Gerichtshofes* (1938).

<sup>5</sup> This appears to be the effect of Article 25; 'judges' in the last paragraph does not include *ad hoc* (national) judges. On the question of *quorum* see Fachiri, pp. 50, 51; Hudson, *Permanent Court*, pp. 323-326.

<sup>6</sup> For details see Hudson, *Permanent Court*, pp. 304-307.

Court, may 'exercise any political or administrative function' (Article 16),<sup>1</sup> a provision which, though aimed at divorcing them as far as possible from the interests of their own States, probably also excludes them from discharging political or administrative functions of an international character, as, for instance, on the staff of the League.<sup>2</sup> Nor may any member of the Court 'act as agent, counsel, or advocate in any case of an international nature' (Article 17).<sup>3</sup>

Competence of the Court.<sup>4</sup>

§ 25ae. A fundamental question which is answered by the Statute is the question whether the right of litigating in the Court is confined to States or extends to individuals. The view held by the author of this work was that States solely and exclusively (apart from the League of Nations) are the subjects of International Law' and entitled to the rights and subject to the duties arising from that law.<sup>5</sup> We find in Article 34 of the Statute that 'only States or members of the League of Nations can be parties in cases before the

<sup>1</sup> See Hudson, *Permanent Court*, pp. 340-342. The Protocol of Revision of 1929 inserted here a further restriction by adding the words 'nor engage in any other occupation of a professional nature.'

<sup>2</sup> But not on committees appointed by the League; e.g. Dr. Loder, a judge of the Court, is a member of the Committee of Experts for the Progressive Codification of International Law, as also is Dr. Wang, a deputy-judge. See Publications of the Court, Series E, No. 1, pp. 247-248. In 1931 the Court expressed the view that 'any function which compelled a person to follow the instructions of his Government, regardless of his personal views, was "political" in the meaning of Article 16': Series E, No. 7, p. 278. And see *ibid.*, p. 277, for an affirmation of the right of the judges to accept membership of commissions of conciliation and inquiry. Obviously, a judge who sat on such a commission would be debarred from sitting on the Court in the same case. And see *ibid.*, No. 4, p. 270, and No. 7, pp. 277 and 287, for decisions of the Court on some questions of incompatibility.

<sup>3</sup> The words 'of an international nature' were suppressed in the Protocol of Revision of 1929.

<sup>4</sup> See generally Bustamante, *The World Court*, pp. 179-219; Fachiri, pp. 70-106; Politis, pp. 166-175 and 235-246; Hudson, *Permanent Court*, pp. 358-409; Magyary, *La juridiction de la Cour Permanente de Justice Internationale* (1931); Goetze, *Die Zuständigkeit internationaler Gerichtshöfe* (1933); Blociszewski in *R.G.*, xxix. (1922) pp. 22-46; Hammarskjöld in *R.I.*, 3rd ser., ix. (1928) pp. 82-99; Borel and Politis (with notes by Huber and others) in *Annuaire*, xxxiii. (2) (1927) pp. 669-834; Jacoby in *A.J.*, xxx. (1936) pp. 233-255. See also Series D and E of the Publications of the Court. As to the restrictions upon jurisdiction arising out of so-called *litispendance*, see Ténékidès in *R.G.*, xxxvi. (1929) pp. 502-527; and Bosco, *Rapporti e conflitti fra giurisdizioni internazionali* (1932). See also, as to other conditions of jurisdiction in general, Witenberg in *Hague Recueil*, 1932 (iii.), pp. 5-132.

<sup>5</sup> See above, vol. i. § 13.

Court'<sup>1</sup>; for there are members of the League, for instance India and most of the British self-governing dominions, who are not States in the full international sense. This does not mean that in no circumstances can the Court adjudicate upon the claims of private individuals. It means that, before it can do so, a Government must espouse a claim of the individual and bring it before the Court.<sup>2</sup> As the Court has stated on a number of occasions, 'by taking up a case on behalf of its nationals before an international tribunal, a State is asserting its own right—that is to say, its right to ensure, in the person of its subjects, respect for the rules of international law.'<sup>3</sup>

The Court is open to (i) members of the League; (ii) the States mentioned in the Annex to the Covenant, even if not members of the League—that is, the United States<sup>4</sup>

<sup>1</sup> The constitution of the now defunct Central American Court of Justice, mentioned in § 25ab, provided that the Court could take cognisance of claims which an individual subject of one of the contracting States might raise against any other contracting State, whether his Government supported his claim or not. As to the Mixed Arbitral Tribunals see vol. i. § 289 (n.). And see n. 2, below.

<sup>2</sup> In fact, the majority of the judgments of the Court have been concerned with claims of a private origin. See on access of individuals to international tribunals—and to the Permanent Court in particular: *Minutes of the Committee of Jurists of 1920*, pp. 204-217; Salvioli in *Rivista*, 3rd ser., ii. (1923) p. 501 (n. 3); Rundstein in *R.I.*, 3rd ser., x. (1929) pp. 431-453, 762-783; Ténékidès, *ibid.*, xi. (1930) pp. 473-493, and xiii. (1932) pp. 89-111; Baumgarten, *ibid.*, pp. 742-799; Borchard in *A.J.*, xxiv. (1930) pp. 359-365; Sobolewski in *R.G.*, xxxviii. (1931) pp. 420-437; Séfériades in *Annuaire*, xxxv. (1) (1929) pp. 505-582, and in *Hague Recueil*, 51 (1935) (i.), pp. 5-119. And see the literature referred to below on p. 69, n. 7 (*Brazilian and Serbian Loans cases*). See also vol. i. § 155, on nationality of claims. As to questions of private International Law which came before the Court see Ham-

mar skjöld, *Revue critique de droit international*, xxx. (1934) pp. 315-344. See also Niboyet, *Quelques considérations sur la justice internationale et le droit international privé* (1929). And see Strisower in *Annuaire*, xxxv. (1) (1929) pp. 585-647; Rundstein in *Hague Recueil*, 1928 (iii.), pp. 331-459. On private arbitration in international relations see Balladore Pallieri in *Hague Recueil*, 51 (1935) (i.), pp. 291-403.

<sup>3</sup> *Brazilian Loans Case*, Series A, No. 14, p. 17; *Mavrommatis Palestine Concessions Case*, Series A, No. 2, p. 12; *Factory at Chorzów Case*, Series A, No. 17, pp. 25-29; *The Panevezys-Saldutiskis Railway Case*, Series A/B, No. 76, p. 16.

<sup>4</sup> The United States, following upon the passing of a Resolution by the Senate on January 27, 1926, intimated to the Secretary-General of the League of Nations its desire to adopt and adhere to the Statute of the Court, provided that all the Powers who have adopted the Statute of the Court will indicate to the United States, through an exchange of notes, their acceptance of a number of reservations and understandings. Of these the fifth reservation provided as follows:

'That the Court shall not render any advisory opinion except publicly after due notice to all States adhering to the Court and to all interested

and the Hedjaz ; and (iii) other States which shall previously have made a declaration of acceptance of the jurisdiction

States, and after public hearing or opportunity for hearing given to any State concerned ; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.' See *A.J.*, xx. (1926), Suppl., pp. 73, 74.

The reservations of the United States were considered in September 1926 by a conference of forty States signatories to the Protocol establishing the Statute. In the Final Act and Protocol the States represented at the Conference agreed to accept the reservations of the United States with the exception of the second half of the fifth reservation. (See Cmd. 2776 (1926) ; *A.J.*, xxi. (1927), Suppl., pp. 1-11. See also *Minutes of the Conference* (Publications of the League, v. Legal, 1926, v. 26).) There was no disposition to acquiesce in the contention that in the reservation in question the United States asked merely for the concession of a right already enjoyed by members of the Council, namely, the right to prevent by a single vote a request for an advisory opinion. For the very question whether unanimity of all members of the Council (or of the Assembly) is required for a request for an advisory opinion was then, and is still, controversial (see below, p. 59). See Lauterpacht in *Toynbee, Survey*, 1926, pp. 80-98 ; Kraus in *R.I.*, 3rd ser., vii. (1926) pp. 281-320 ; Miller in *Columbia Law Review*, xxvi. (1926) pp. 654-670 ; Garner in *R.G.*, xxxiii. (1926) pp. 139-164, 209-245 ; Wright in *A.J.*, xxi. (1927) pp. 1-25 ; Baldoni in *Rivista*, xix. (1927) pp. 17-33. The United States did not agree to a modification of the fifth reservation, and the question remained in abeyance until September 1929, when the United States signed a special Protocol of Adherence to the Court. The Protocol embodied the reservations made in 1926, including the substance of the fifth reservation. In regard to the latter the Protocol laid down the procedure to be followed for ascertaining whether the

United States objected to an advisory opinion being given by the Court in any individual case and for an exchange of views on the matter. But instead of endowing the veto of the United States with a binding effect, the Protocol provided that, in case of the failure of negotiations between the United States and the Council or the Assembly and the unwillingness of the United States to forgo its objection to a contemplated request for an advisory opinion, the United States will exercise the right of withdrawal from the Court as provided by the Protocol. The Protocol was submitted to the vote of the Senate of the United States in February 1935. It failed to secure the required majority. It must be noted that throughout the discussions concerning the adherence to the Court there was no question of the United States undertaking any commitments conferring upon the Court obligatory jurisdiction in disputes to which the United States is a party. The question of the adherence of the United States to the Court has produced an enormous literature which is carefully noted in the successive issues of Series E of the Publications of the Court. The reader will find there also an account of the various stages of the proposed adherence. See also Bustamante, *The World Court and the United States* (1929) ; Fleming, *The Treaty Veto of the American Senate* (1930), pp. 168-250 ; Jessup, *The Permanent Court of International Justice: American Accession and Amendments to the Statute* (International Conciliation Pamphlet No. 254, 1929), pp. 521-576 ; the same, *The United States and the World Court* (World Peace Foundation, 1929) ; Martin, *The Permanent Court of International Justice and the Question of American Adhesion* (1932) ; Fachiri in *B.Y.*, 1930, pp. 84-92 ; Raestad in *R.I. (Paris)*, iii. (1929) pp. 308-339 ; Hudson in *A.J.*, xxii. (1928) pp. 776-796 ; Bourquin in *R.G.*, xxxvii. (1930) pp. 241-286 ; Paul de Vineuil in *R.I.*, 3rd ser., xi. (1930) pp. 621-638 ; Hudson, *Permanent Court*, pp. 209-231 ; Wickersham in *George Washington Law Review*,

of the Court either generally or *ad hoc*, and have given an undertaking to carry out in full good faith the decisions of the Court and not to resort to war against a State complying therewith.<sup>1</sup> Further, it should be mentioned that it is the practice of the Council, when requesting an advisory opinion,<sup>2</sup> to instruct the Secretary-General of the League to give all necessary assistance to the Court, 'and, if necessary, to take steps to be represented before the Court.'

Before defining the jurisdiction of the Court it is worth while recalling the general principle of International Law<sup>3</sup> that no State can be compelled to litigate against its will. We must, therefore, seek as the basis of the jurisdiction of the Court the consent of the litigant, given either generally and in advance, or *ad hoc* and upon the occurrence of the dispute. International society has not yet reached, as national societies or States have, the point at which any creditor or party injured can summon his debtor or aggressor before a court without the latter's consent to go there. There is no reluctance on the part of States to appeal to the existing rule of International Law on this matter. In fact, a great number of the judgments given by the Court have been concerned in one form or other with a plea to the jurisdiction of the Court, namely, with a contention that the jurisdictional clause invoked by the plaintiff State did not actually confer jurisdiction upon the Court.<sup>4</sup>

In addition to its advisory function (see below) the jurisdiction of the Court (Article 36) may be classified as either voluntary or obligatory. It is (i) *voluntary* in regard to 'all cases which the parties refer to it' by a special, *ad hoc*, agreement.<sup>5</sup> Voluntary  
Jurisdiction.

It is (ii) *obligatory* by virtue (a) of special clauses in Conventional Conventional  
Jurisdiction.  
i. (1932) pp. 3-17; Toynbee, *Survey*, 1929, pp. 70-90. For the text of the Protocol of Accession of the United States and the Protocol of Signature of 1929 see Treaty Series, No. 13 [1930]; *Documents*, 1929, pp. 31-38; Hudson, *World Court Reports*, i. pp. 104, 105.

<sup>1</sup> See Resolution of the Council of May 17, 1922 (*Off. J.*, June 1922, pp. 545-546), adopted in pursuance of Article 35 of the Statute. And see

Series C, No. 13 (ii.), pp. 7, 28, for a declaration to that effect by Turkey in the *Lotus* case.

<sup>2</sup> See below (iii), p. 58.

<sup>3</sup> See above, § 12.

<sup>4</sup> Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 29-33.

<sup>5</sup> See Thévenaz, *Le compromis d'arbitrage devant la Cour Permanente de Justice Internationale* (1938).

treaties other than those referring specifically to pacific settlement. This category includes disputes under those parts of the Treaty of Versailles and other peace treaties at the end of the World War which provide for the reference to the Court of disputes as to the interpretation of their provisions, disputes as to interpretation under the Mandates and the Minority Treaties,<sup>1</sup> and disputes under many other treaties, general or particular, which have been concluded since the establishment of the Court and provide for reference to the Court.<sup>2</sup>

(b) Of treaties of pacific settlement providing for judicial settlement usually in conjunction with conciliation or with arbitration and conciliation (see below, § 25*ah*), or

Optional  
com-  
pulsory  
Juris-  
diction.

(c) Of the so-called 'Optional Clause' of Article 36 of the Statute of the Court which any member of the League, or any State mentioned in the Annex to the Covenant, or (with a certain limitation)<sup>3</sup> any other State admitted to participate in the benefits of the Court, may choose to make binding upon itself. The Committee of Jurists proposed that the Court's normal and regular jurisdiction should be compulsory in all cases of a legal nature as enumerated in Article 13 of the Covenant, but, mainly owing to the opposition of some of the Great Powers, this provision was deleted from the Statute before it was adopted by the Assembly. Nevertheless, it was replaced by a provision enabling members of the League and States mentioned in the Annex to the Covenant to declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal<sup>4</sup> disputes concerning (a) the interpretation of a treaty, (b) any

<sup>1</sup> As to these two see Feinberg in *Hague Recueil*, 59 (1937) (i.), pp. 591-702.

<sup>2</sup> For a lucid survey of these treaties see Fachiri, pp. 84-90. On jurisdictional clauses in conventions establishing international unions see Gidel in *Annuaire*, xxxix. (1) (1936) pp. 246-405; *ibid.*, (2) pp. 256-288.

<sup>3</sup> See Section 2 of the Resolution of the Council of May 17, 1922 (*Off. J.*,

June 1922, pp. 545-546).

<sup>4</sup> The editor has elsewhere given his reasons for the view that the term 'legal' is merely descriptive of the four categories of disputes enumerated in Article 36, and that it does not imply any additional qualification. Any dispute falling within one of these categories is *ipso facto* 'legal.' See Lauterpacht, *The Function of Law*, pp. 34-37, 199-201.

question of International Law, (c) the existence of any fact which, if established, would constitute a breach of an international obligation, (d) the nature and extent of the reparation to be made for the breach of an international obligation. This obligation is only operative as against an opponent which has itself accepted the obligation, and is in that respect always conditional<sup>1</sup>; it may be accepted without limit of time or only for a certain number of years; and other conditions or reservations excluding a particular class of disputes may be attached, though the Statute does not mention this. With minor exceptions, all Governments which are now bound by the Optional Clause have attached more or less wide reservations.<sup>2</sup> The British Declaration of Acceptance which in September 1929 gave a strong impetus to the signature of the Optional Clause on the part of many States, covered 'all disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification, other than:

'Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement'<sup>3</sup>; and

'Disputes with the Government of any other Member of

<sup>1</sup> As Fachiri, pp. 96, 97, and Hudson, *Permanent Court*, p. 397, point out, the words 'on condition of reciprocity' in the penultimate paragraph of Article 36 seem tautologous. However, they may not be altogether unnecessary inasmuch as they intimate that any reservation attached to the Optional Clause by a State may be invoked against that State by any other signatory of the Clause. See Article 39 (3) of the General Act of 1928, which lays down expressly that 'if one of the Parties to the dispute has made a reservation, the other Parties may enforce the same reservation in regard to that Party.' See also on the question of reciprocity, Enriques in *R.I.*, 3rd ser., xiii. (1932) pp. 834-860.

<sup>2</sup> On the Optional Clause and the reservations thereto see Hudson, *Permanent Court*, pp. 387-409, and in *Iowa Law Review*, xix. (1934) pp. 190-217; Fischer Williams in *B.Y.*, 1930,

pp. 63-84; the same, *Chapters on Current International Law* (1929), pp. 37-41; Lauterpacht in *Economica*, June 1930, pp. 137-172, and the same, *The Function of Law*, pp. 34-37, 199-201; Higgins, *British Acceptance of Compulsory Jurisdiction under the Optional Clause* (1929); Cory, *Compulsory Arbitration* (1932), pp. 113-135; Fachiri, pp. 95-100; Wundram, *Die Fakultativklausel* (1933); Hepburn in *Georgetown Law Review*, xix. (1930) pp. 66-98. For the text of the reservations see *Documents*, 1929, pp. 38-51; Hudson, *Permanent Court*, pp. 610-630; the same, *World Court Reports*, i. (1934) pp. 29-49; the successive issues of Publications of the Court, Series E. As to the omitted reservation of matters of prize law see below, §§ 447 and 447a.

<sup>3</sup> See Ténékidès in *R.I.*, 3rd ser., xvii. (1936) pp. 719-740. See also Kuneralp, *Konkurrenz internationaler Schiedsgerichtsbarkeiten* (1938).



the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree<sup>1</sup>; and

'Disputes with regard to questions which by international law fall exclusively within the jurisdiction of the United Kingdom.'<sup>2</sup>

Other States have attached similar and, in some cases, even wider reservations. On the outbreak of the war with Germany in September 1939 Great Britain, invoking the change of circumstances which had taken place since the ratification of the acceptance of the Clause in February 1930, added a further reservation to the effect that she will not regard the Clause as covering disputes arising out of events occurring during the hostilities.<sup>3</sup> The effect of some

<sup>1</sup> As to the recommendations, respectively, of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation in 1929 and of the Imperial Conference in 1930 concerning the settlement of inter-imperial disputes see (1930) Cmd. 3479 and (1930) Cmd. 3717. The latter merely recommended the setting up of *ad hoc* tribunals for the settlement of 'justiciable' disputes. There was no provision for any measure of obligatory settlement. See Keith in *Journal of Comparative Legislation*, 3rd ser., xii. (1930) pp. 284, 285; MacKay in *Proceedings of the Canadian Political Science Association*, iv. (1932) pp. 68-81; Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (1931), pp. 124-136. And see generally on the settlement of disputes between members of composite States, Lauterpacht, *The Function of Law*, Appendix, pp. 439-452.

<sup>2</sup> There was also attached 'the condition that His Majesty's Government reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided . . . that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined

by decision of all the members of the Council other than the parties to the dispute.'—Misc. No. 8 (1929). And see Misc. No. 12 (1929), Cmd. 3452, for the Official Memorandum of the British Government on the subject.

<sup>3</sup> Cmd. 6108 (1939); *Off. J.*, 1939, p. 408. Australia, India, and New Zealand took the same step. It was stated that a reservation of this nature was omitted in 1929 on the ground that it was then anticipated that members of the League would take common action against the aggressor State and that accordingly there would be no occasion for claims by neutrals on account of the manner of the conduct of the war. France sent a similar communication invoking, like Great Britain, the fact that since the Optional Clause had been signed conditions had fundamentally changed owing to the circumstance that the system established in the Covenant for the settlement of disputes had ceased to be 'uniformly and compulsorily' binding upon the members of the League and that the question of belligerent and neutral rights appeared therefore in an entirely new light: *ibid.*, p. 409. Switzerland took note of these communications, but reserved her rights: *ibid.*, p. 410. Belgium and Holland made a similar reservation. In general, unilateral termination of the obligations of the Optional Clause must be regarded as subject to conditions governing the

of the reservations, e.g. of that relating to past disputes,<sup>1</sup> is far-reaching. The reservation referring to matters which according to International Law are exclusively within the domestic jurisdiction of the defendant State is scientifically unsound and unnecessary inasmuch as the position of the defendant State in these matters is fully safeguarded by International Law. But the result of that particular reservation is to introduce (probably unfounded) doubts as to the jurisdiction of the Court to entertain such disputes at all. The cumulative effect of the reservations has been to reduce to some extent the importance of the Optional Clause. Nevertheless the latter constitutes the most comprehensive and most important instrument of obligatory judicial settlement. Apart from the reservations, there is probably no dispute which does not come within the purview of the four categories of disputes enumerated in the Optional Clause.<sup>2</sup> In recent years the obligations undertaken by

termination of treaties. A radical change of circumstances may clearly constitute a condition of this nature. In June 1938 Paraguay informed the Secretary-General of the League that in view of the cessation of her membership in the League she decided to withdraw henceforth her declaration of acceptance of the compulsory jurisdiction of the Court under Article 36 of the Statute: *Off. J.*, 1938, p. 650. As the original declaration was without a time limit a number of States expressly reserved their rights in the matter for the future: *ibid.*, p. 1180. See Fachiri in *B.Y.*, xx. (1939) pp. 52-57.

<sup>1</sup> For an interpretation of the reservation of 'past disputes' see the Judgments of the Court in 1938 in the case between Italy and France concerning the Phosphates in Morocco (Series A/B, No. 74), and in 1939 in the case between Belgium and Bulgaria concerning the Electricity Company of Sofia and Bulgaria (Series A/B, No. 77).

<sup>2</sup> Probably this would be so even if the Clause embraced only disputes as to 'any question of international law'; that category is, it is believed, wide enough to include the other three classes of disputes enumerated

in Article 36. In view of this, undue importance need not be attached to the way in which the various categories of disputes in Article 36 are formulated. Thus, e.g., the circumstance that the Court has jurisdiction to decide as 'to the existence of any fact which if established would constitute a breach of an international obligation' does not mean that it has no jurisdiction to decide on any other fact, provided that the finding on such a fact is necessary for a decision of a dispute falling under one of the other categories enumerated in Article 36. See Fischer Williams, *Chapters on Current International Law*, pp. 40-101; Hudson in *Iowa Law Review*, xix. (1934) pp. 201-217; Lauterpacht, *The Function of Law*, pp. 280-283; Salvioli in *R.I.*, 3rd ser., xiii. (1932) pp. 71-88. See also the memorandum submitted by the Belgian delegation at the Locarno conference and quoted by Rolin in *R.I.*, 3rd ser., viii. (1927) p. 600. In the case concerning the *Serbian Loans* the Court held that 'the facts the existence of which the Court has to establish may be of any kind,' for 'the States concerned may agree that the facts to be established would constitute a breach of an international obligation': Series A, No. 14, p. 19.

virtue of the Optional Clause have become the principal source of the activity of the Court.<sup>1</sup>

Advisory  
Juris-  
diction.

It is (iii) *advisory*.<sup>2</sup> Article 14 of the Covenant provides that 'the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.' The Statute of the Court does not mention the advisory jurisdiction,<sup>3</sup> but the Revision Protocol of 1929 contained additional Articles (65-68) regulating that jurisdiction. These Articles, which have now entered into force, embody the relevant provisions of the Rules of the Court (Articles 71-74) as amended in 1926, 1927, and 1931. This jurisdiction has in fact proved to be much more fertile and more important than was originally contemplated, and up to date the Court has delivered twenty-six advisory opinions as against thirty judgments. The advisory function of the Court is designed primarily to assist the Council and the Assembly in the discharge of their duties of conciliating and

<sup>1</sup> See, e.g., the Judgments in the case of the *Diversion of Water from the Meuse* between Belgium and Holland (June 1937 : Series A/B, No. 70) ; in the case of the *Phosphates in Morocco* between Italy and France (June 1938 : Series A/B, No. 74) ; in the case of the *Panevezys-Saldutiskis Railway* between Lithuania and Esthonia (February 1939 : Series A/B, No. 76) ; and in the case of *Sofia and Bulgaria Electricity Company* between Bulgaria and Belgium (April 1939 : Series A/B, No. 77). An important instance of a case decided under the Optional Clause was that between Denmark and Norway concerning the sovereignty over Eastern Greenland (April 1933 : Series A/B, No. 53).

<sup>2</sup> See Hudson in *Harvard Law Review*, xxxvii. (1924) pp. 971-1001 ; the same, *Permanent Court*, pp. 432-467 ; the same, *Advisory Opinions of the Permanent Court* (1925) (International Conciliation Pamphlet No. 214), and in *Hague Recueil*, 8 (1925) (iii.), pp. 345-411 ; Bustamante, *The World Court*, pp. 253-266 ; Philipsee, *Les fonctions consultatives de la Cour Permanente* (1928) ; Lessing, *Die Gutachten des Ständigen Internationalen Gerichtshofes* (1932) ; Hoffmann, *Gutachten und Gutachtenverfahren des*

*Ständigen Internationalen Gerichtshofes* (1935) ; Remlinger, *Les avis consultatifs de la Cour Permanente de Justice Internationale* (1938) ; Kaufmann, *Die Gutachten des Ständigen Internationalen Gerichtshofes* (1939) ; Read in *Canadian Bar Review*, iii. (1925) pp. 186-194 ; Salvioi in *Rivista*, 3rd ser., iii. (1924) pp. 308-324 ; *Annuaire*, xxxiv. (1928) pp. 408-457 (Report of de Lapradelle and Negulesco) ; Erich in *R.I.*, 3rd ser., ix. (1928) pp. 864-881 ; Ch. de Visscher in *Hague Recueil*, 26 (1929) (i.), pp. 5-75 ; Meriggi in *Rivista*, xxii. (1930) pp. 62-90 ; Hammarskjöld in *Festgabe für Max Huber* (1934) ; Negulesco in *Hague Recueil*, 57 (1936) (ii.), pp. 3-91, and in *Annuaire*, xxxix. (1) (1936) pp. 215-232 ; *ibid.*, pp. 468-494. On some questions the Rules regulate matters of substance not provided for in the Statute. See, e.g., Article 40 of the Rules relating to counter-claims, as to which see Hudson, *Permanent Court*, § 446, and Genet in *R.I.*, 3rd ser., xix. (1938) pp. 145-178.

<sup>3</sup> The Committee of Jurists' Draft Scheme contained an article dealing with it which was deleted by the Assembly Sub-Committee : *First Assembly, Meetings of Committees*, i. p. 401.

reporting upon disputes submitted to them, by affording them an authoritative legal opinion upon points of law; much in the same way as the British Crown may consult the Judicial Committee of the Privy Council, and many of the State Governments in the United States of America may consult their Supreme Courts. Strictly speaking, there are no contesting parties when the Court is exercising its advisory jurisdiction, but the Rules of Court instruct the Court to give notice of the request for an advisory opinion to the members of the League and to the States mentioned in the Annex to the Covenant, and in practice the interested parties do appear by counsel before the Court and argue the case.<sup>1</sup> Since the establishment of the Court there has in fact taken place a gradual assimilation of the contentious and advisory jurisdiction so far as the procedure before the Court is concerned. In September 1927 the Court amended Article 71 of its Rules so as to enable States to nominate national judges in advisory procedure relating to an existing dispute in the same way as provided by Article 31 in the case of contentious procedure.<sup>2</sup> Article 68 of the revised Statute merely confirmed the existing practice when it provided that 'in the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognises them to be applicable.' When we add to this the fact that the Council has so far in every case<sup>3</sup> adopted the Court's advisory opinion, which thereupon forms the legal basis of the Council's report, the line in point of actual effect (although not necessarily of legal obligation) between a judgment and an advisory opinion is thin; so much so that the Court when asked for an advisory opinion in the *Eastern Carelia* case<sup>4</sup> stated that 'answering the question (put to them) would be substantially equivalent

<sup>1</sup> Russia, however, declined to appear in the *Eastern Carelia* case.

<sup>2</sup> Series E, No. 4, pp. 72-78. And see below, p. 95.

<sup>3</sup> But not always without some modification in giving effect to it, e.g. in the case of Advisory Opinion No. 6, relating to settlers of German

origin in Poland, *Off. J.*, February 1924, pp. 360-361. See Hudson, *Permanent Court*, pp. 457-466, on the effect given to the Advisory Opinions of the Court. See also Engel in *R.I.*, 3rd ser., xvii. (1936) pp. 768-800.

<sup>4</sup> Publications of the Court, Series B, No. 5, at p. 29.

to deciding the dispute between the parties'; and accordingly, one of the parties refusing to appear, the Court declined to give an opinion.<sup>1</sup>

The formal<sup>2</sup> initiative in obtaining an advisory opinion is taken not by the parties but by the Council or by the Assembly. It is uncertain whether the Council's decision to make a request for an opinion requires a simple majority of votes on the Council as being a 'matter of procedure' under Article 5 of the Covenant, or absolute unanimity, or the qualified unanimity defined in paragraph 6 of Article 15 of the Covenant. The significance of this point lies in the fact that, since the parties to a dispute are entitled under Article 4 of the Covenant to have representatives sitting *as members* on the Council when dealing with that dispute, either party could, if absolute unanimity is required, veto the request for an opinion. If, on the other hand, absolute unanimity were not required, the Council would in effect have something very like the power to compel the parties to litigate their dispute *volens volens*.<sup>3</sup> The Assembly has

<sup>1</sup> See Ch. de Visscher in *R.I.*, 3rd ser., ix. (1928) pp. 258-262; Hammarskjöld, *ibid.*, pp. 712-725; Ténékidès in *R.G.*, xxxiii. (1926) pp. 120-129.

<sup>2</sup> In some cases the function of the Council has been purely ministerial, inasmuch as the initiative for the request to the Court came from the parties to a dispute without having actually been dealt with by the Council: see Advisory Opinions Nos. 14, 16, and 17.

<sup>3</sup> There must also be considered another possibility, namely, that the unanimous vote need not include the votes of the parties to the dispute (the principle of qualified unanimity) — a view for which some support, it is believed, may be found in the Advisory Opinion No. 12 concerning the interpretation of the Treaty of Lausanne. See Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 46-50, and see, in support of this view, Sir Cecil Hurst at the Conference, in 1926, of the States signatories of the Statute assembled to consider the reservations of the

United States (see above, p. 52): *Minutes of the Conference*, p. 24. The Conference was not prepared to accept the view that an absolutely unanimous vote was required for a request for an advisory opinion. And see *Records of the Ninth Assembly, Plenary Meetings*, pp. 64, 73, for the Swiss suggestion made in 1928 to request the Court to give an advisory opinion on this aspect of the matter. The Assembly adopted a resolution inviting the Council to submit the question to study. In 1929 the Council invited each of its members to study the matter: *Off. J.*, 1929, p. 10. In 1935 a similar resolution was put forward before the Assembly, but no decisive action, other than that resulting in renewed study of the problem, was taken. See Hammarskjöld in *R.I.*, 3rd ser., xvii. (1936) pp. 65-96. And see *Record of the Eleventh Assembly, First Committee*, pp. 104, 166, 169, concerning the recommendation of the Committee of Jurists which the Council entrusted with the task of considering the amendments of the Covenant 'to bring it into harmony with the Pact of Paris.' That recom-

not yet requested an advisory opinion from the Court ; the argument on the question of unanimity seems to be equally relevant to the Assembly's decision to make a request.

What rules of law are applied by the Court ? Article 38 is as follows :

The Rules  
of Law  
Applicable. ✓

The Court shall apply—

- ✓1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting States ;
- ✓2. International custom, as evidence of a general practice accepted as law ;
- ✓3. The general principles of law recognised by civilised nations ;

4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The paragraphs numbered 1, 2, 3, 4 do not introduce any new legal elements, and substantially represent the practice of international tribunals of arbitration when engaged in determining a dispute on strictly judicial lines.<sup>1</sup> The last

mentation, according to which the request for an advisory opinion did not require a unanimous vote, did not find general support.

Finally, the view has been propounded that, except where the Council merely seeks an opinion on a question which is not in itself one of procedure, its decision to make a request is not a 'matter of procedure' and requires absolute unanimity of the members of the Council present at the meeting. See Engel, *Art. 5 and Art. 14 Satz 3 der Völkerbundsatzung* (1936); McNair in *B.Y.*, 1926, pp. 1-13; Sibert in *R.G.*, xxxiv. (1927) pp. 594-597; Mandelstamm in *Hague Recueil*, 1926 (iv.), pp. 525-540. See also Ch. de Visscher in *R.I.*, 3rd ser., ix. (1928) pp. 254-258; Hammar-skjöld, *ibid.*, pp. 690-711; Erich, *ibid.*, pp. 864-881; Hudson, *Permanent Court*, pp. 437-444; Fachiri,

pp. 82-84. On the question of unanimity and the League generally see vol. i. § 187*e*.

<sup>1</sup> Nevertheless, paragraph 3 signified a landmark in International Law and a rejection of the extreme positivist doctrine inasmuch as it expressly admitted the binding force of principles of law other than those expressed in international treaties and custom. It definitely removed the spectre of the contingency—which had never before existed in law or materialised in practice—of the Court having to refuse to give a decision on the ground that there is no law applicable to the case. See vol. i. §§ 15-19. As to paragraph (3), 'general principles of law,' see *Proceedings of the Committee of Jurists* who drafted the Statute, pp. 273-338; Anzilotti, *Corso di diritto internazionale* (French translation by Gidel, 1929), pp. 116-

paragraph indicates the intention of the States concurring in the establishment of the Court that, while predominantly a Court of Justice, it should not be precluded from acting in a less rigid capacity if the parties choose to authorise it.<sup>1</sup>

The position of judicial precedents as a factor influencing the Court in its work demands notice. As is well known, the Anglo-American system of law on the one hand, and most Continental systems on the other, exhibit a marked formal<sup>2</sup> contrast in regard to the effect of previous decisions. Article 59, which provides that 'The decision of the Court has no binding force except between the parties and in respect of that particular case,' seems to embody the desire to exclude the strict Anglo-American doctrine of judicial precedent (*stare decisis*). But the habit of being influenced, consciously or unconsciously, by conclusions previously formed *in pari materia* is an inevitable mental process to which judges like others are subject, and experience has

120; Scerni, *I principi generali di diritto riconosciuti dalle nazioni civili nella giurisprudenza della Corte Permanente di Giustizia Internazionale* (1932); Kalberlah, *Die Rechtsnatur der 'allgemein anerkannten Regeln des Völkerrechts' gemäss Artikel 4 der Weimarer Reichsverfassung* (1933); Härle, *Die allgemeinen Entscheidungsgrundlagen des Ständigen Internationalen Gerichtshofes. Eine kritisch-würdigende Untersuchung über Artikel 38 des Gerichtshof-Statuts* (1933); Dencker, *Der Rang der 'allgemein anerkannten Regeln des Völkerrechts' gegenüber dem staatlichen Gesetzrecht* (1933); Salvioli in *Rivista*, 3rd ser., iii. (1924) pp. 275-285; Verzijl in *R.I.*, 3rd ser., vi. (1925) pp. 741-744; Wolff in *Hague Recueil*, 1931 (ii.), pp. 479-550; Castberg, *ibid.*, 1933 (i.), pp. 341-375; Ripert, *ibid.*, 1933 (ii.), pp. 569-663; Verdross in *Festschrift for Hans Kelsen* (1931), pp. 354-365; the same in *Annuaire*, 1932, pp. 283-328 and in *Hague Recueil*, 52 (1935) (ii.), pp. 195-201; Raestad in *Acta Scandinavica*, iv. (1933) pp. 62-84; Ch. de Visscher in *R.I.*, 3rd ser., xiv. (1933) pp. 395-420; Kopelmanas in *R.G.*, xliii. (1936) pp. 285-308.

<sup>1</sup> The question of the power of the Court to give decisions of *aequo et bono* became topical in connection with the

dispute between Switzerland and France concerning the Free Zones. The circumstances of that case and the wording of the special agreement submitting the dispute to the Court were responsible for some expressions in the Order of the Court which seem to call in doubt the power of the Court to depart, at the authorisation of the parties, from the existing law: Series A, No. 24, pp. 11, 12. Normally, there ought to be no doubt as to the powers of the Court to proceed in this manner. But see the Observations of Judge Kellogg (*ibid.*, pp. 28 *et seq.*) which, it is believed, disregard both the wording and the intention of the last paragraph of Article 38. See Roden in *R.I.*, 3rd ser., xii. (1931) pp. 757-773; Strupp, *Das Recht des Richters, nach Billigkeit zu statuieren* (1930); Lauterpacht, *op. cit.*, pp. 64-68, and *The Function of Law*, pp. 318-320; Hudson, *Permanent Court*, pp. 530-532; Borel in *Annuaire*, 1934, pp. 188-224. And see above, p. 24.

<sup>2</sup> It has been elsewhere suggested by the editor that this contrast is in regard to the actual effect of previous decisions less marked than is commonly supposed: see *B.Y.*, 1931, pp. 52-59.

shown that Article 59 and the reference to it in Article 38 have not hindered the Court in its task of consolidating and enlarging the *corpus juris gentium*. In fact, while the political conditions of the world have not permitted the Court to apply the rule of law to important political controversies directly threatening the peace, it has been amply fulfilling the other part of the task which was expected of it at the time of its establishment. It has become an effective agency for developing and clarifying International Law. Without regarding itself as bound by its previous decisions, the Court has constantly referred to its former pronouncements in order either to indicate the continuity of its views on a given subject or to explain apparent inconsistencies.<sup>1</sup> A substantial part of International Law is now covered by the decisions of the Court. ✓

✓ § 25af. The official languages are French and English, Procedure.<sup>2</sup>

<sup>1</sup> Examples of such constant reference will be found in the successive issues of Series E of the Publications of the Court (Chapter VI.: Digest of Decisions taken by the Court). As to the meaning of Article 59 see Lauterpacht in *B.Y.*, 1931, pp. 57-61, and the same, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 3-12; Hudson, *Permanent Court*, pp. 536-540. On the development of International Law by the Court see Hudson, *op. cit.*, pp. 523-573; Lauterpacht, *op. cit.*; Drezga, *Les problèmes fondamentaux du droit des gens et la Cour Permanente de Justice Internationale* (1931); Derevitsky, *Les principes du droit international tels qu'ils se dégagent de la jurisprudence de la Cour Permanente de Justice Internationale* (1932); Schmid, *Die Rechtsetzung des Ständigen Internationalen Gerichtshofs* (1932); Colette, *Les principes de droit des gens dans la jurisprudence de la Cour Permanente de Justice Internationale* (1932); Genet, *Précis de jurisprudence de la Cour Permanente de Justice Internationale* (1933); Salvioi in *Hague Recueil*, 1926 (ii.), pp. 1-114; Verzijl in *Z.V.*, xiii. (1926) pp. 489-543; Negulesco in *R.G.*, xxxiii. (1926) pp. 194-208; Berge, Wilson, Maktos, Deak, and Hudson in *A.S. Proceedings*,

1930, pp. 34-70; Watrin in *R.I. (Paris)*, viii. (1931) pp. 161-219; Beckett in *B.Y.*, xi. (1930) pp. 1-54, in *Hague Recueil*, 39 (1932) (i.), pp. 135-269, and 50 (1934) (iv.), pp. 193-305; Hammarskjöld in *International Affairs*, xiv. (1935) pp. 797-817; Dehousse in *R.I. (Paris)*, 17 (1936), pp. 85-117. On the authority in English Courts of decisions of the Permanent Court of International Justice see Jenks in *B.Y.*, xx. (1939) pp. 1-36.

See also the digests of the decisions of the Court from 1922 to 1930 in *Fontes Juris Gentium*, edited by Bruns, Series A (1), vol. i. (1931), and in the successive issues of the Annual Digest of Public International Law Cases.

<sup>2</sup> Article 30 empowers the Court to lay down rules for regulating its procedure. The original 'Rules of Court' will be found in Fachiri, pp. 364-384; Series D, No. 1, 2nd ed., pp. 23-49; Hudson, *Permanent Court*, pp. 653-681. See also Hammarskjöld in *R.I.*, 3rd ser., iii. (1922) pp. 125-148, and viii. (1927) pp. 322-359. For the minutes of meetings in connection with the preparation and revision of the Rules during the sessions of the Court in 1922, 1927, 1931, and 1936, see Publications of the Court, Series D, No. 2, and the supplements thereto.



and the Court may at the request of the parties authorise the use of another language (Article 39). The Court may, when necessary, indicate both to the parties and to the Council 'any provisional measures which ought to be taken to reserve the respective rights of either party' (Article 41, and Rules of Court, Article 61).<sup>1</sup>

The parties are represented by agents, and have the assistance of counsel or advocates (Article 42).<sup>2</sup> The procedure consists of the exchange of written 'cases, counter-cases, and, if necessary, replies,' and of an oral 'hearing by the Court of witnesses, experts, agents, counsel, and advocates' (Article 43).<sup>3</sup> The hearing is in public unless

On March 11, 1936, new Rules, taking into account the various amendments to the Statute of the Court and repealing all previous Rules, were adopted and promulgated. They are printed in Series D, No. 1 (3rd ed.); *A.J.*, xxx. (1936), Suppl., pp. 129-152. For comment thereon see Hudson in *A.J.*, xxx. (1936) pp. 463-470. See also Hudson, *ibid.*, xxv. (1931) pp. 427-435, and *Permanent Court*, pp. 258-280; Hammarskjöld in *R.I.*, 3rd ser., viii. (1927) pp. 322-359; Guerrero in *R.I.F.*, i. (1936) pp. 425-438; Soerni in *Rivista*, xxxix. (1937) pp. 12-37, and in *Hague Recueil*, 65 (1938) (iii.), pp. 565-679.

<sup>1</sup> It has been suggested (with some hesitation) that States bound by the Protocol of Signature of the Statute are bound to conform with the measures indicated by the Court (see Hudson, *Permanent Court*, p. 415), but this suggestion finds no support in the letter of the Statute. On one occasion, in the case concerning the *Denunciation of the Treaty of 1865 between China and Belgium*, the President, acting under Article 57 of the Rules, indicated provisional measures of protection on the ground, *inter alia*, that the alleged infraction of the Treaty 'could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form' (Series A, No. 8, p. 7). On a number of occasions the Court declined to comply with applications for provisional measures. See Hudson, *op. cit.*, pp. 414-419; Fachiri,

p. 111; Guggenheim, *Les mesures provisoires de procédure internationale* (1931), pp. 55-80, and in *Hague Recueil*, 1932 (ii.), pp. 676-696; Niemeyer, *Einstweilige Verfügungen des Weltgerichtshofes* (1932); Dumbauld, *Interim Measures of Protection in International Controversies* (1932); Hammarskjöld in *Z.ö.V.*, v. (1935) pp. 5-33. Probably the Court would be entitled to treat the refusal to comply with an indication of interim protection as a material factor in the assessment of damages. In the case between Belgium and Bulgaria concerning the Electricity Company of Sofia and Bulgaria, the Court for the first time in its history issued, on December 5, 1939, an Order indicating as an interim measure of protection that Bulgaria should ensure that pending the final judgment of the Court no step of any kind would be taken capable of prejudging the rights claimed by Belgium or of aggravating or extending the dispute submitted to the Court: Series A/B, No. 79. See also as to the General Act, § 25*aj* (*in fine*).

<sup>2</sup> See Hudson, *Permanent Court*, pp. 471-476; Rupp, *Staatsvertreter vor internationalen Schiedsgerichten* (1938). Judgment cannot go by default; if one of the parties does not appear and the other asks for judgment, the Court must before doing so satisfy itself that it has jurisdiction and that the claim is well founded in law and in fact (Article 53).

<sup>3</sup> See Guynat in *R.G.*, xxxvii. (1930) pp. 312-323, and Hudson, *Permanent*

the Court shall otherwise decide or the parties shall demand a hearing *in camera* (Article 46), but the deliberations of the Court take place in private and remain secret (Article 54).<sup>1</sup> The Court may entrust any individual, body, bureau, commission, or other organisation with the task of carrying out an inquiry, or giving an expert opinion (Article 51). The Court is empowered to 'make orders for the conduct of the case' (Article 48).<sup>2</sup>

All questions, including the judgment of the Court, are decided by a majority of the judges present at the hearing, and the President or his deputy has a casting vote<sup>3</sup>; the judgment<sup>4</sup> states the reasons on which it is based and the names of the judges taking part in the decisions, dissenting judges having the right to deliver separate opinions (Articles 55 to 57).<sup>5</sup> The judgment is final and without appeal; but

*Court*, pp. 496-510. For an instance of examination of witnesses and 'expert witnesses' see the case concerning *Certain German Interests in Polish Upper Silesia*: Series C, No. 11, vol. i. p. 31. In regard to the pleadings of agents and counsel, the reality of the proceedings is naturally enhanced if judges address to them questions from time to time. There has recently been less hesitation than before to resort to such questions: see Hudson, *Permanent Court*, pp. 508, 509, and Bruns, *Der internationale Richter* (a lecture; 1934), p. 21.

<sup>1</sup> Neither the Statute nor the Rules provide for visits by the Court to places concerned in the proceedings. In the case relating to the waters of the Meuse the Court decided, by an order of May 13, 1937, 'to carry out an inspection on the spot.' For comment see Hudson in *A.J.*, xxxi. (1937) p. 696.

<sup>2</sup> Such orders have been issued in procedural questions like fixing time-limits or formulating questions put to agents. But they have also been used in matters of substance, e.g. for instituting an inquiry by experts (*Chorzów Factory* case: Series A, No. 17, p. 99), for admitting or rejecting evidence offered by the parties (*Oder Commission* case: Series A, No. 23, p. 41), for complying with or rejecting requests for provisional measures

(*Case between Belgium and China*: Series A, No. 8, p. 6; *Polish Agrarian Reform and the German Minority*: Series A/B, No. 58, p. 175), for admitting or rejecting an application for the admission of a national judge (*Austro-German Customs Union* case: Series A/B, No. 41, p. 88). Moreover, in the *Free Zones* case the Court, confronted with an arbitration agreement requesting it to act in a manner which it did not deem to be consistent with its Statute, had recourse to the issue of an Order in which it gave its views on important aspects of the merits of the dispute: Series A, Nos. 22 and 24.

<sup>3</sup> The President exercised this right in the *Lotus* case (Series A, No. 10).

<sup>4</sup> The elaborate way in which the judgment is prepared and drafted is lucidly described by Hammarskjöld in *Michigan Law Review*, xxv. (1927) pp. 327 *et seq.* And see Series D, No. 2 (second supplement), pp. 300, 301, for a formulation of the Court's practice as adopted in 1931.

<sup>5</sup> In addition, judges may add observations in order to emphasise certain aspects of the case or to indicate points on which they disagree with the majority in whose judgment they otherwise concur. Toffin, *La dissidence à la Cour Permanente de Justice Internationale* (1937).

in two ways it may come before the Court again: (i) for *interpretation*, in the event of any dispute as to its meaning or scope<sup>1</sup>; and (ii) for *revision*, only 'upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence'; this application for revision must be made within six months from the discovery of the new fact, and within ten years from the date of the judgment (Articles 60, 61). Each party bears its own costs, unless the Court shall otherwise order (Article 64).<sup>2</sup>

A third State which considers 'that it has an interest of a legal nature which may be affected by the decision in the case' may be allowed by the Court to intervene as a third party<sup>3</sup>; and every State which is party to a convention of which the construction by the Court is in question must be notified by the Registrar, and has the right to intervene in the proceedings—with, however, this consequence, that, having exercised this right, the judgment is equally binding upon it (Articles 62, 63).<sup>4</sup>

A judge of the nationality of a contesting party retains his right to sit in the case before the Court; and if the Court includes no judge of the nationality of a contesting party, that party has the right to nominate a judge of its

<sup>1</sup> But not so as to go beyond the limits of the judgment. See Series A, Judgment No. 4 (*Interpretation of Judgment No. 3 (Treaty of Neuilly, Article 179, Annex, para. 4)*). And see Series A, No. 13 (Judgment No. 11 concerning the interpretation of Judgments Nos. 7 and 8).

<sup>2</sup> So far, the Court has in no case ordered one party to pay the costs of the other.

<sup>3</sup> Thus in the *Wimbledon* case, Publications of the Court, Series A, No. 1, the intervention of Poland was allowed. In the case concerning the Acquisition of Polish Nationality the Court refused to allow intervention by Roumania: Series C, No. 3, vol. 3, p. 1089. See on intervention generally, Hudson, *Permanent Court*, pp. 369-372; Farag, *L'intervention devant*

*la Cour Permanente de Justice Internationale* (1927); Bastid in *Revue politique et parlementaire*, cxxxvii. (1929) pp. 100-114; Friede in *Z.ö.V.*, iii. (1932) pp. 1-67; Scerni in *Scritti giuridici in onore di Santo Romano* (1939); Scalfati in *Rivista*, xxxi. (1939) pp. 262-279.

<sup>4</sup> The Court has held that Article 63 as well as Article 36, which gives the Court obligatory jurisdiction for determining questions of law or fact, made it possible for it to give judgments having a 'purely declaratory effect': Judgment No. 7 (*Chorzów Factory case*: Series A, No. 7, p. 19). On declaratory judgments in International Law in general see Borchard in *A.J.*, xxix. (1935) pp. 488-492. See also Caloyanni in *R.I.F.*, iii. (1937) pp. 233-243.

own nationality, selecting a deputy-judge if there be one of its own nationality, and, if not, some other person (Article 31 and Article 3 of the Rules)<sup>1</sup>; it has happened that both contesting parties have exercised this right. Since 1927 these rules apply to advisory procedure.

Provision is made for three special chambers: (i) for Labour cases, particularly cases referred to in Part XIII. (Labour) of the Treaty of Versailles and the corresponding portions of the other treaties of peace, a chamber of five judges, assisted by technical assessors; (ii) for 'cases relating to transit and communications, particularly cases referred to in Part XII. (Ports, Waterways, and Railways) of the Treaty of Versailles and the corresponding portions of the other treaties of peace,' a chamber of five judges, assisted by technical assessors; and (iii) a chamber of three judges 'who, at the request of the contesting parties, may hear and determine cases by summary procedure' (Articles 26 to 29).<sup>2</sup>

§ 25ag. The following is a list of the judgments, advisory opinions, and orders<sup>3</sup> which have already been given by the Permanent Court of International Justice:

List of  
Judgments,  
Advisory  
Opinions,  
and  
Orders.

(A) *Judgments:*

(1) On August 17, 1923, in the case of *Great Britain, France, Italy,*

<sup>1</sup> The general view seems to be that, at least in the present stage of international organisation, the institution of national judges is useful and ought to be retained. This was also the view of the Committee of Jurists who in 1929 considered the revision of the Statute. See Doc. C. 166. M. 66. 1929. V., pp. 51 *et seq.*, and Anon. in *R.I. (Paris)*, iv. (1929) pp. 29-31; Fachiri, pp. 55-60; Hill in *A.J.*, xxv. (1931) pp. 670-683; and Hudson, *Permanent Court*, pp. 333-339, who maintains that national judges have shown 'a certain amount of independence' and that they 'do not always consider themselves as representatives of the State which appoints them.' But he admits that 'As a rule . . . judges *ad hoc* have not failed to support the position of their Governments, even when this placed them in a minority of one' (at p. 338). For this, and more

general reasons, the editor has urged that the institution of national judges perpetuates the idea of representation of national interests on the Court and ought not therefore to be regarded as being permanently connected with a Court whose judges are supposed to represent the interests of justice only and exclusively: see Lauterpacht, *The Function of Law*, pp. 228-235. Probably the best justification for the national judge is the biological one, namely, that the institution indicates the emergence of judicial settlement out of less developed methods of pacific settlement.

<sup>2</sup> See, for instance, Publications of the Court, Series A, No. 4 (*Interpretation of Judgment No. 3*), by three judges sitting as a court of summary procedure.

<sup>3</sup> Until 1931 the Judgments and Orders of the Court were published in Series A of its publications, and

and Japan (*Poland* intervening) v. *Germany*, concerning the régime of the Kiel Canal under Article 380 of the Treaty of Versailles (*S.S. Wimbledon*).<sup>1</sup>

(2) On August 30, 1924, in the case of *Greece v. Great Britain*, concerning the Mavrommatis Palestine Concessions.<sup>2</sup>

(3) On September 12, 1924, in the case of *Bulgaria v. Greece*, concerning the interpretation of Article 179, Annex, para. 4, of the Treaty of Neuilly (a case of summary procedure).<sup>3</sup>

(4) On March 26, 1925, in the case of *Bulgaria v. Greece*, concerning the interpretation of Judgment No. 3 (a case of summary procedure).<sup>4</sup>

(5) On March 26, 1925, in the case of *Greece v. Great Britain*, concerning the Mavrommatis Jerusalem Concessions.<sup>5</sup>

(6) On August 25, 1925, in the case of *Germany v. Poland*, concerning certain German interests in Polish Upper Silesia (jurisdiction).<sup>6</sup>

(7) On May 25, 1926, in the case of *Germany v. Poland*, concerning certain German interests in Polish Upper Silesia (merits).<sup>7</sup>

(8) On July 26, 1927, in the case of *Germany v. Poland*, concerning

Advisory Opinions in Series B. Since 1931 all the pronouncements of the Court are published in a combined Series A/B. For details concerning the individual judgments and advisory opinions see Series C of the Publications of the Permanent Court of International Justice (*Acts and Documents relating to Judgments and Advisory Opinions given by the Court*), which contains for the most part the cases and counter-cases submitted by the parties, the written and oral argument, the minutes of the sessions, as well as other relevant acts and documents. Series E, published by the Court since 1925, is indispensable to a study of the work of the Court. It contains an annual report of the Court's work. It includes information on the organisation of the Court and the various instruments relating to its jurisdiction; it gives an account of the changes in the Statute and the Rules and a digest of the decisions of the Court bearing on the matter; and it contains a very full list of official and unofficial publications referring to the Court.

<sup>1</sup> Series A, No. 1. See also Wolgast, *Der Wimbledon-prozess* (in *Internationalrechtliche Abhandlungen*) (1926); Geissler, *Der Wimbledon-Fall* (1926); Vineuil in *R.I.*, 3rd ser., iv. (1923) pp. 574-581; Hostie in

*Revue de droit international*, 1933, No. 3. See also Horter, *Die völkerrechtliche Stellung des Kieler Kanals nach dem Versailler Vertrag* (1932).

<sup>2</sup> Series A, No. 2. See also Feinberg, *La juridiction de la Cour Permanente de Justice Internationale dans le système des mandats* (1930); M. de Grotte in *R.I.*, 3rd ser., vii. (1926) pp. 214-223; Bentwich in *Law Quarterly Review*, 44 (1928), pp. 450-463; Hostie in *Revue de droit international*, 1933, No. 3. And see the references to the subsequent Judgments in this case.

<sup>3</sup> Series A, No. 3. See also Vineuil in *R.I.*, 3rd ser., vi. (1925) pp. 92-98; Yotis in *Chunet*, 53 (1926), pp. 879-889.

<sup>4</sup> Series A, No. 4.

<sup>5</sup> Series A, No. 5. See also Stoyanovsky, *The Mandate for Palestine* (1928), pp. 135-149, 325-334; Borchard in *A.J.*, xix. (1925) pp. 728-738; Vineuil in *R.I.*, 3rd ser., vi. (1925) pp. 98-114; Bentwich in *Zö.V.*, i. (1929), Part I. pp. 212-222.

<sup>6</sup> Series A, No. 6.

<sup>7</sup> Series A, No. 7. See also Kunz in *Zeitschrift für Ostrecht*, ii. (1926) pp. 1137-1147; Gidel in *Chunet*, 54 (1927), pp. 824-831, and in *R.I. (Paris)*, i. (1927) pp. 76-132; Fischer Williams in *B.Y.*, 1928, pp. 6-10.

the claim for indemnity in respect of the factory at Chorzów (jurisdiction).<sup>1</sup>

(9) On September 7, 1927, in the case of *Turkey v. France*, concerning the S.S. *Lotus*.<sup>2</sup>

(10) On October 10, 1927, in the case of *Greece v. Great Britain*, concerning the readaptation of the Mavrommatis Jerusalem Concessions (jurisdiction).<sup>3</sup>

(11) On December 16, 1927, in the case of *Germany v. Poland*, concerning the interpretation of Judgments Nos. 7 and 8 (the Chorzów factory).<sup>4</sup>

(12) On April 26, 1928, in the case of *Germany v. Poland*, concerning the rights of minorities in Upper Silesia (minority schools).<sup>5</sup>

(13) On November 13, 1928, in the case of *Germany v. Poland*, concerning the claim for indemnity in respect of the factory at Chorzów (merits).<sup>6</sup>

(14) On July 12, 1929, in the case of *France v. Yugoslavia*, concerning Serbian Loans issued in France.<sup>7</sup>

<sup>1</sup> Series A, No. 9.

<sup>2</sup> Series A, No. 10. In addition to writers referred to in vol. i. p. 284, n. 3, see Portail, *L'affaire du Lotus* (1928); Walther, *L'affaire du Lotus ou de l'abordage hauturier en droit pénal international* (1928); Canonne, *Essai de droit pénal international. L'affaire du 'Lotus'* (1929); Hamacher, *Der Ständige Internationale Gerichtshof und der Fall Lotus* (1929); Schmidt, *Der 'Lotus-Fall' vor dem Ständigen Internationalen Gerichtshof im Haag* (1931); Rebbe, *Der Lotusfall vor dem Weltgerichtshof* (1932); Beckett in *B.Y.*, 1927, pp. 108-128; Salvioli in *Rivista*, iv. (1927) pp. 521-549; Fischer Williams in *R.G.*, xxxv. (1928) pp. 367-376, and *Chapters on Current International Law and the League of Nations* (1929), pp. 208-231; Sandiford in *Revue de droit maritime*, xvii. (1928) pp. 7-25; Niboyet in *Revue critique de législation et de jurisprudence*, xlviii. (1928) pp. 453-474; Travers in *R.I.*, 3rd ser., ix. (1928) pp. 400-421; Michel de Grotte, *ibid.*, x. (1929) pp. 387-394, 396-408; Demeur, *ibid.*, xii. (1931) pp. 737-756; Hostie in *Revue de droit international*, 1933, No. 3.

<sup>3</sup> Series A, No. 11. See also Bentwich in *Z.ö.V.*, i. (1929) pp. 212-222, and Feinberg, *op. cit.*

<sup>4</sup> Series A, No. 13.

<sup>5</sup> Series A, No. 15. See also

Roddes, *La minorité allemande en Haute-Silésie polonaise* (1929); Feinberg, *La juridiction de la Cour Permanente dans le système de la protection internationale des minorités* (1931), pp. 118-130; Bruns in *Deutsche Zeitschrift für das europäische Minoritätenproblem*, x. (1928) pp. 698-709; Michel de Grotte in *R.I.*, 3rd ser., x. (1929) pp. 414-424; Warschauer in *Zeitschrift für Ostrecht*, 1932, pp. 561-566.

<sup>6</sup> Series A, No. 17. See also Marburg in *Strupp, Wört.*, iii. (1929) pp. 763-772; M. de Grotte in *R.I.*, 3rd ser., x. (1929) pp. 229-270; Vineuil, *ibid.*, xi. (1930) pp. 767-769; Magyary in *Revue de droit international*, vi. (1930) pp. 419-461; Engelsdoerfer in *R.I.*, 3rd ser., xvi. (1935) pp. 443-453.

<sup>7</sup> Series A, No. 20. See also Lapradelle, *Causés célèbres du droit des gens. La question des emprunts serbes devant la justice internationale* (1929); Watrin, *Essai de construction d'un contentieux international des dettes publiques* (1929); Genet in *R.G.*, iii. (1929) pp. 669-694; Ascarelli in *Rivista*, 3rd ser., viii. (1929) pp. 576-597; André-Prudhomme in *Chunet*, 56 (1929), pp. 837-895; Nussbaum in *Hague Recueil*, 1933 (i.), pp. 559-657; Kuhn in *A.J.*, xxviii. (1934) pp. 312-315.

(15) On July 12, 1929, in the case of *France v. Brazil*, concerning Brazilian Federal Loans issued in France.<sup>1</sup>

(16) On September 10, 1929, in the case of *Germany v. Czechoslovakia, Great Britain, France, Denmark, and Sweden v. Poland*, concerning the territorial jurisdiction of the International Commission of the River Oder.<sup>2</sup>

(17) On June 7, 1932, in the case of *France v. Switzerland*, concerning the Free Zones of Upper Savoy and the District of Gex.<sup>3</sup>

(18) On June 24, 1932, in the case concerning the interpretation of the Statute of Memel (jurisdiction).<sup>4</sup>

(19) On August 11, 1932, in the case concerning the interpretation of the Statute of Memel.<sup>5</sup>

(20) On April 5, 1933, in the case of *Denmark v. Norway*, concerning Eastern Greenland.<sup>6</sup>

(21) On December 15, 1933, in the case of the *Peter Pázmány University v. The State of Czechoslovakia*, concerning an appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal.<sup>7</sup>

(22) On March 17, 1934, in the case of *France v. Greece*, concerning Lighthouses.<sup>8</sup>

(23) On December 12, 1934, in the *Oscar Chinm* case between Great Britain and Belgium.<sup>9</sup>

(24) On December 16, 1936, in the *Pajzs, Czáký, Esterházy* case between Hungary and Yugoslavia (on appeal from the judgments of the Hungaro-Yugoslav Mixed Arbitral Tribunal).<sup>10</sup>

(25) On June 28, 1937, in the case between *Belgium and Holland* concerning the Diversion of Water from the Meuse.<sup>11</sup>

<sup>1</sup> Series A, No. 21. See also Ténékidès in *R.I.*, 3rd ser., xi. (1930) pp. 473-493; Vineuil, *ibid.*, pp. 770-781; and the literature cited in the previous note.

<sup>2</sup> Series A, No. 23. See also Uecker, *Die rechtliche Stellung der Oder, mit besonderer Berücksichtigung des Streites über die räumliche Zuständigkeit der Internationalen Oderkommission* (1931); Vineuil in *R.I.*, 3rd ser., xi. (1930) pp. 785-792.

<sup>3</sup> Series A/B, No. 46. See also Trémaud, *La question des Zones franches devant la Cour Permanente de Justice Internationale* (1931), and in *R.G.*, iv. (1930) pp. 476-510; Voss, *Der Genfer Zonenstreit* (1933); Burckhardt in *R.I.*, 3rd ser., xi. (1930) pp. 90-122; Engelsdoerfer in *R.I.*, 3rd ser., xvi. (1935) pp. 299-311.

<sup>4</sup> Series A/B, No. 47.

<sup>5</sup> Series A/B, No. 49. See also Hélliard, *Le statut international de Memel* (1932); Hallier, *Die Rechtslage des Memelgebiets* (1933); Gross in *Zeitschrift für Politik*, 1932, pp. 518-532; Engelsdoerfer in *R.I.*, 3rd ser., xvi. (1935) pp. 311-320.

<sup>6</sup> Series A/B, No. 53. See also Rasmussen in *R.I.*, 3rd ser., xii. (1931) pp. 220-233; Cohn, *ibid.*, xiv. (1933) pp. 557-571; Strupp in *Acta Scandinavica*, iv. (1933) pp. 3-8; Redslob, *ibid.*, pp. 9-25; Hyde in *A.J.*, xxvii. (1933) pp. 732-738; Engelsdoerfer in *R.I.*, 3rd ser., xvi. (1935) pp. 321-333.

<sup>7</sup> Series A/B, No. 61.

<sup>8</sup> Series A/B, No. 62.

<sup>9</sup> Series A/B, No. 63.

<sup>10</sup> Series A/B, No. 68.

<sup>11</sup> Series A/B, No. 70.

(26) On October 8, 1937, in the case between *France and Greece* concerning the Lighthouses in Crete and Samos.<sup>1</sup>

(27) On June 14, 1938, in the case between *Italy and France* concerning Phosphates in Morocco (Preliminary Objections).<sup>2</sup>

(28) On February 28, 1939, in the case between *Estonia and Lithuania* concerning the Railway Line Panevezys-Saldutiskis.<sup>3</sup>

(29) On April 4, 1939, in the case between *Belgium and Bulgaria* concerning the Electricity Company of Sofia and Bulgaria (Preliminary Objection).<sup>4</sup>

(30) On June 15, 1939, in the case between *Belgium and Greece* concerning the 'Société Commerciale de Belgique.'<sup>5</sup>

(B) *Advisory Opinions :*

(1) On July 31, 1922, on the interpretation of Article 389, para. 3, of the Treaty of Versailles (nomination of delegates to the International Labour Conference).<sup>6</sup>

(2) On August 12, 1922, on the question whether the competence of the International Labour Organisation extends to international regulation of the conditions of labour of persons employed in agriculture.<sup>7</sup>

(3) On August 12, 1922, on the question whether examinations of proposals for the organisation and development of methods of agricultural production fall within the competence of the International Labour Organisation.<sup>8</sup>

(4) On February 7, 1923, on the question whether a dispute between France and Great Britain regarding the Nationality Decrees issued by France in Tunis and Morocco (French zone) and their application to British subjects was by International Law solely a matter of domestic jurisdiction or not.<sup>9</sup>

<sup>1</sup> Series A/B, No. 71.

<sup>2</sup> Series A/B, No. 74. See Staedtler in *R.I.*, 3rd ser., xx. (1939) pp. 323-338.

<sup>3</sup> Series A/B, No. 76.

<sup>4</sup> Series A/B, No. 77.

<sup>5</sup> Series A/B, No. 78.

<sup>6</sup> Series B, No. 1. See also Mahaim in *R.I.*, 3rd ser., iii. (1922) pp. 518-520; Hammarskjöld in *Harvard Law Review*, 36 (1923), pp. 712-722.

<sup>7</sup> Series B, No. 2. See also Mahaim, *loc. cit.*, pp. 520-523; Chateau, *De la compétence de l'Organisation Internationale du Travail en matière du travail agricole* (1924); Hiitonen, *La compétence de l'Organisation Internationale du Travail*, i. (1929) pp. 109-149; Guerreau in *R.G.*, xxix. (1922) pp. 223-255; Hammarskjöld in *Har-*

*vard Law Review*, 36 (1923), pp. 717-722.

<sup>8</sup> Series B, No. 3.

<sup>9</sup> Series B, No. 4. See also Politis, *La Justice internationale* (1924), pp. 186-189; Winkler, *Essai sur la nationalité dans les protectorats de Tunisie et du Maroc* (1926); Anon. in *Revue de droit international privé*, xviii. (1922-1923) pp. 1-287; Picard in *Clunet*, 50 (1923), pp. 256-266; Vineuil in *R.I.*, 3rd ser., iv. (1923) pp. 291-301; Ruzé, *ibid.*, pp. 597-627; Gregory in *A.J.*, xvii. (1923) pp. 293-307; Redtslob in *R.I. (Geneva)* (1924), pp. 5-15; Latey in *Grotius Society*, ix. (1924) pp. 49-60. And see the writers referred to below, § 25f (Matters of Domestic Jurisdiction).



(5) On July 23, 1923, concerning the status of Eastern Carelia.<sup>1</sup>

(6) On September 10, 1923, on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland.<sup>2</sup>

(7) On September 15, 1923, on certain questions arising out of the application of Article 4 of the Polish Minority Treaty.<sup>3</sup>

(8) On December 6, 1923, concerning the delimitation of the Polish-Czechoslovakian frontier (question of Jaworzina).<sup>4</sup>

(9) On September 4, 1924, regarding the delimitation of the Serbo-Albanian frontier at the Monastery of Saint-Naoum.<sup>5</sup>

(10) On February 21, 1925, concerning the meaning and scope which should be attributed to the word 'established' in Article 2 of the Convention of Lausanne (exchange of Greek and Turkish populations).<sup>6</sup>

(11) On May 16, 1925, regarding certain questions relating to the Polish postal service in the port of Danzig.<sup>7</sup>

(12) On November 21, 1925, concerning the interpretation of Article 3, para. 2, of the Treaty of Lausanne (frontier between Turkey and Iraq).<sup>8</sup>

<sup>1</sup> Series B, No. 5. See also Fortuin, *La question Carélienne* (1925); Vineuil in *R.I.*, 3rd ser., iv. (1923) pp. 581-585; Erich, *ibid.*, pp. 227-235; Kalijarvi in *A.J.*, xviii. (1924) pp. 93-97.

<sup>2</sup> Series B, No. 6. See also *Studien zur Lehre von der Staatensukzession, Drei Gutachten*, by Sir Thomas Barclay, A. Struycken, A. Kaufmann (1923); Vineuil in *R.I.*, 3rd ser., iv. (1923) pp. 585-591; Bellot in *Clunet*, 51 (1924), pp. 321-330.

<sup>3</sup> Series B, No. 7. See also Feinberg, *La Jurisdiction de la Cour Permanente dans le système de la protection internationale des minorités* (1931), pp. 97-117; Vineuil in *R.I.*, 3rd ser., iv. (1923) pp. 591-596; Garner in *A.J.*, xx. (1926) pp. 130-135.

<sup>4</sup> Series B, No. 8. See also Raubal, *Formation de la Frontière entre la Pologne et la Tchécoslovaquie* (1928), pp. 108-126; Krömar in *R.G.*, xxx. (1923) pp. 402-413; Vineuil in *R.I.*, 3rd ser., v. (1924) pp. 130-142, 232-236; Spiegel in *Zeitschrift für öffentliches Recht*, iv. (1924) pp. 5-50.

<sup>5</sup> Series B, No. 9. See also Nikitovitch, *L'affaire du Monastère de Saint-Naoum. Étude du droit international public* (1927); Vineuil in *R.I.*, 3rd ser., vi. (1925) pp. 92-98.

<sup>6</sup> Series B, No. 10. See also Streit, *Der Lausanner Vertrag und der*

*griechisch-türkische Bevölkerungsaustausch* (1929); Devedji, *L'échange obligatoire des minorités grecques et turques* (1930); Hecker, *Der völkerrechtliche Wohnsitzbegriff* (1931); Ladas, *The Exchange of Minorities. Bulgaria, Greece and Turkey* (1932), pp. 168, 406, 534; M. de la Grotte in *R.I.*, 3rd ser., vii. (1926) pp. 223-230; Sfériades in *Hague Recueil*, 1928 (iv.), pp. 311-439.

<sup>7</sup> Series B, No. 11. See also Lewinsky and Wagner, *Danziger Staats- und Völkerrecht* (1927), pp. 309-339; Maass, *Der Danzig-Polnische Briefkastenstreit zur Entscheidung des Völkerbundes am 11 Juni 1925* (1929); Weidenmann, *Der Danzig-Polnische Poststreit* (1932); Verzijl in *Zeitschrift für Ostrecht*, ii. (1926) pp. 353-385; Schroeder in *Z.V.*, xiv. (1927), Suppl. pp. 63-68.

<sup>8</sup> Series B, No. 12. See also Hooper, *L'Iraq et la Société des Nations* (1928), pp. 63-96; Gidel, *Consultation sur l'Article 3, para. 2, du Traité de Lausanne*, etc. (1925), and in *R.G.*, 2nd ser., vii. (1925) pp. 402-422; Verzijl in *R.I.*, 3rd ser., vi. (1925) pp. 732-750; Whitton in *R.G.*, xxxii. (1925) pp. 403-422; Quincy Wright in *A.J.*, xx. (1926) pp. 453-464; Le Fur in *R.G.*, xxx. (1926) pp. 60-103, 209-245; Keith in *Journal of Comparative Legislation*,

(13) On July 23, 1926, on the question whether the competence of the International Labour Organisation extends incidentally to the regulation of work when performed by an employer himself.<sup>1</sup>

(14) On December 8, 1927, concerning the jurisdiction of the European Commission of the Danube.<sup>2</sup>

(15) On March 3, 1928, on the jurisdiction of the courts of Danzig in the matter of the Danzig railway officials.<sup>3</sup>

(16) On August 28, 1928, regarding the interpretation of the Greco-Turkish Agreement of December 1, 1926 (Final Protocol, Article IV.).<sup>4</sup>

(17) On July 31, 1930, on the interpretation of the Convention between Greece and Bulgaria respecting Reciprocal Emigration, dated November 27, 1919 (the Greco-Bulgarian 'Communities').<sup>5</sup>

(18) On August 26, 1930, regarding the compatibility of the special legal situation of the Free City of Danzig with membership of the International Labour Organisation.<sup>6</sup>

(19) On May 15, 1931, on access to German minority schools in Polish Upper Silesia.<sup>7</sup>

(20) On September 5, 1931, on the customs régime between Germany and Austria (Protocol of March 19, 1931).<sup>8</sup>

viii. (1926) pp. 38-49; M. de la Grotte in *R.I.*, 3rd ser., vii. (1926) pp. 330-344; Briggs, *ibid.*, viii. (1927) pp. 626-655; von Elbe in *Z.ö.V.*, i. (1929) pp. 391-418.

<sup>1</sup> Series B, No. 13. See also Morellet, *The Competence of the International Labour Organisation* (1926); Hiitonen, *La compétence de l'Organisation Internationale du Travail*, i. (1929) pp. 275-288.

<sup>2</sup> Series B, No. 14. See also Vallotton, *Le régime juridique du Danube maritime devant la Cour Permanente de Justice Internationale* (1928); Ravard, *Le Danube maritime et le port de Galatz* (1929), pp. 107-129; Hajnal, *Le Droit du Danube international* (1929), and the same in *R.I.*, 3rd ser., ix. (1928) pp. 588-645; Krieg in *Z.V.*, xv. (1929) pp. 215-244; Radovanovitch in *R.I.*, 3rd ser., xiii. (1932) pp. 564-631.

<sup>3</sup> Series B, No. 15. See also Le Fur in *R.G.*, 3rd ser., ii. (1928) pp. 262-283; M. de la Grotte in *R.I.*, 3rd ser., x. (1929) pp. 404-414.

<sup>4</sup> Series B, No. 16.

<sup>5</sup> Series B, No. 17. See also Ténékidès in *R.I.*, 3rd ser., xii. (1931) pp. 234-261; Becker, *ibid.*, xiii. (1932) pp. 538-542.

<sup>6</sup> Series B, No. 18. See also Verzijl in *Zeitschrift für Ostrecht*,

1930, pp. 1147-1170; Massart in *Rivista*, 3rd ser., x. (1931) pp. 171-198; Baumgarten in *Z.V.*, xvi. (1931) pp. 275-284; Becker in *R.I.*, 3rd ser., xiii. (1932) pp. 542-546; Hostie, *ibid.*, xiv. (1933) pp. 596-614, and xv. (1934) pp. 77-92.

<sup>7</sup> Series A/B, No. 40.

<sup>8</sup> Series A/B, No. 41. See also Váli, *Die deutsch-österreichische Zollunion vor dem Ständigen Internationalen Gerichtshof* (1932); Velhagen, *Die Zollunion im Völkerrecht* (1932); La Rochebrochard, *L'union douanière austro-allemande* (1934); Borchard in *A.J.*, xxv. (1931) pp. 711-716; Brierly in *Z.ö.V.*, iii. (1931) pp. 68-75, and in *Law Quarterly Review*, xlviii. (1932) pp. 1, 2; Bilfinger, *Z.ö.V.*, iii. (1931) pp. 163-175; Cassidy in *Georgetown Law Journal*, xx. (1931) pp. 57-72; Lhomme in *R.G.*, 3rd ser., v. (1931) pp. 466-499; Nolde, *ibid.*, vi. (1932) pp. 261-359; Becker in *R.I.*, 3rd ser., xiii. (1932) pp. 548-557; Jessup in *A.J.*, xxvi. (1932) pp. 105-110; Fachiri in *B.Y.*, 1932, pp. 68-75; Mathews in *Michigan Law Review*, xxx. (1932) pp. 699-708; Manning in *New York University Law Quarterly Review*, ix. (1932) pp. 339-343; Davis in *Atlantic Monthly*, 149 (1932), pp. 119-130.

(21) On October 15, 1931, on railway traffic between Lithuania and Poland.<sup>1</sup>

(22) On December 11, 1931, concerning access to and anchorage in the port of Danzig for Polish war vessels.<sup>2</sup>

(23) On February 4, 1932, regarding the treatment of Polish nationals in Danzig.<sup>3</sup>

(24) On March 8, 1932, concerning the interpretation of the Caphandaris-Molloff Agreement of December 9, 1927.<sup>4</sup>

(25) On November 15, 1932, on the interpretation of the Convention of Washington of 1919 concerning the employment of women during the night.<sup>5</sup>

(26) On April 6, 1935, on Minority Schools in Albania.<sup>6</sup>

(27) On December 4, 1935, on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City.<sup>7</sup>

(C) Of the *Orders*<sup>8</sup> of the Court the following may be mentioned:

(1) On January 8, 1927, concerning the denunciation of the Treaty of November 2, 1865, between China and Belgium (provisional measures).<sup>9</sup>

(2) On February 15, 1927, concerning the rescission, on the request of the applicant, of the interim measures indicated by the Order of January 8, 1927.<sup>10</sup>

(3) On August 19, 1929, concerning the Free Zones of Upper Savoy and the District of Gex (1st phase).<sup>11</sup>

(4) On December 6, 1930, concerning the Free Zones of Upper Savoy and the District of Gex (2nd phase).<sup>12</sup>

(5) On August 3, 1932, on the south-eastern territory of Greenland (dismissal of request for indication of provisional measures of protection).<sup>13</sup>

(6) On July 29, 1933, concerning the Polish agrarian reform

<sup>1</sup> Series A/B, No. 42. See also Becker in *R.I.*, 3rd ser., xiii. (1932) pp. 557-560; Rutenberg in *Zeitschrift für Ostrecht*, v. (1933) pp. 274-290.

<sup>2</sup> Series A/B, No. 43. See also Weeks, *La condition juridique du Conseil du port et des voies d'eau de Danzig* (1933); Hostie in *R.I.*, 3rd ser., xv. (1934) pp. 94-126.

<sup>3</sup> Series A/B, No. 44. See also Engelsdoerfer in *R.I.*, 3rd ser., xv. (1934) pp. 269-275.

<sup>4</sup> Series A/B, No. 45. See also Engelsdoerfer in *R.I.*, 3rd ser., xv. (1934) pp. 275-280.

<sup>5</sup> Series A/B, No. 50.

<sup>6</sup> Series A/B, No. 64.

<sup>7</sup> Series A/B, No. 65. See Jokl in *R.I.*, 3rd ser., xvii. (1936) pp. 759-767.

<sup>8</sup> For a valuable analysis of the legal nature of the Court's Orders see Rotholz in *R.G.*, xliii. (1936) pp. 643-686.

<sup>9</sup> Series A, No. 8.

<sup>10</sup> Series A, No. 8.

<sup>11</sup> Series A, No. 22.

<sup>12</sup> Series A, No. 24.

<sup>13</sup> Series A/B, No. 48.

and the German minority (dismissal of request for indication of provisional measures of protection).<sup>1</sup>

(7) On November 6, 1937, concerning the *Borchgrave Case* between Belgium and Spain.<sup>2</sup>

## VII

### CONCILIATION IN CONJUNCTION WITH ARBITRATION AND JUDICIAL SETTLEMENT

Barandon, pp. 185-255—Lauterpacht, *The Function of Law*, pp. 38-42, 260-269—Dotremont, *L'arbitrage international et le Conseil de la Société des Nations* (1929), pp. 277-292—Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (1931), pp. 976-990—Efremoff in *Hague Recueil*, 1927 (iii.), 62-140—Ruegger in *R.I.*, 3rd ser., ix. (1929) pp. 91-106—Myers in *Political Science Quarterly*, 46 (1931), pp. 548-588. And see the bibliography on Conciliation, § 11a above; on the General Act, § 25aj below; and on the Swiss, Italian, and Scandinavian treaties, pp. 77, 80, 81 below.

§ 25ah. The theory underlying the post-war treaties for the pacific settlement of international disputes has been that while arbitration and judicial settlement are suitable for the solution of so-called legal controversies (also referred to as 'justiciable,' or 'juridical,' or 'disputes as to rights'), it is necessary also to provide machinery for dealing with the residuum of controversies, namely, the so-called political disputes or conflicts of interests. Thus there has developed a tendency to conclude comprehensive instruments for the pacific settlement of all disputes. Originally separate instruments were entered into for the two categories of disputes.<sup>3</sup> Subsequently, however, it has become the general practice to combine these two kinds of procedure in one instrument

Combina-  
tion of  
Concilia-  
tion, Ar-  
bitration,  
and Judi-  
cial Settle-  
ment.

<sup>1</sup> Series A/B, No. 58; Engelsdoerfer in *R.I.*, 3rd ser., xvi. (1935) pp. 453-473.

<sup>2</sup> Series A/B, No. 72.

<sup>3</sup> See, e.g., the Treaty of Conciliation between Norway and Sweden of June 27, 1924 (this was the date of the conclusion of a number of other conciliation treaties between the several Scandinavian States), *L.N.T.S.*, 28, p. 317, these countries being already bound by the Optional

Clause. In 1928 the United States concluded separate treaties of conciliation and of arbitration with a number of States. See, e.g., the Treaty of Conciliation of May 5, 1928, between the United States and Germany, *ibid.*, 90, p. 172, and the Treaty of Arbitration between these two countries of the same date, *ibid.*, p. 178. See also the Pan-American Treaties of Conciliation and of Arbitration of 1929, *ibid.*, 100, p. 401.

providing both for judicial settlement<sup>1</sup> (and/or arbitration) and conciliation. Those composite treaties differ widely in their effect. Some provide eventually for the binding settlement of all disputes, others exclude a large and elastic class of controversies from the purview of binding settlement.] These two categories may now be considered.

Conciliation as the Exclusive Procedure for 'Political' Disputes.

§ 25*ai*. There exist treaties of conciliation and judicial settlement (or arbitration) which provide for conciliation in regard to so-called political and for arbitration (and/or judicial settlement) for so-called legal disputes. As the duty to have recourse to conciliation implies no obligation to accept the report or finding of the organ of conciliation, the possible effect of these treaties is to leave outside the scope of binding settlement the indefinite and elastic category of political disputes. The first important treaty in this group was the treaty concluded in 1921 between Germany and Switzerland<sup>2</sup> providing for arbitration in the case of disputes of a legal nature, and conciliation in the case of other disputes. The question whether the dispute is susceptible of arbitration or not was to be decided, if necessary, by arbitration.<sup>3</sup>

However, the principal treaties in this group were those constituting the so-called 'Locarno Pact'<sup>4</sup> of December 1,

<sup>1</sup> Such treaties have now become an important factor in the activity of the Permanent Court of International Justice: see, e.g., Judgment in the case of the Electricity Company of Sofia and Bulgaria (April 1, 1939: Series A/B, No. 77), and in the case of the 'Société Commerciale de Belgique' (June 1939: Series A/B, No. 78).

<sup>2</sup> December 3, 1921: *L.N.T.S.*, 12, pp. 281-291. See Perassi in *Rivista*, 3rd ser., i. (1921-1922) pp. 155-165; Schücking, *Vermittlung* (1923), pp. 302-311; Ch. de Visscher in *R.I.*, 3rd ser., iv. (1923) pp. 34-36; Gosweiler, *L'arbitrage international* (1923), pp. 133-151.

<sup>3</sup> It is laid down that disputes which, though of a legal nature, are admitted by both parties to affect independence, integrity of territory, or other vital interests of the highest importance, are subject to conciliation instead of arbitration; and that

if one party pleads that a dispute is of such a character and the plea is not accepted by the other party, this point itself is to be settled by arbitration.

<sup>4</sup> Cmd. 2525; *A.J.*, xx. (1926), Suppl., pp. 21-33; *L.N.T.S.*, 54, p. 305; Rauchberg, *Die Verträge von Locarno* (1926); Dotremont, *op. cit.*, pp. 253-271; Gonsiorowski, *op. cit.*, pp. 486-524; Wehberg in *Strupp, Wört.*, iii. pp. 977-996; Wickham Steed and others in *Journal of the British Institute of International Affairs*, iv. (1925) pp. 286-303; Hyde in *A.J.*, xx. (1926) pp. 108-109; Fenwick, *ibid.*, pp. 108-111; Montluc in *R.I. (Geneva)*, iii. (1925) pp. 267-282, and Strupp, *ibid.*, pp. 303-341; Fauchille, §§ 970 (63)-970 (64); Politis in *R.I.*, 3rd ser., vi. (1925) pp. 713-731; Bisschop in *Grotius Society*, xi. (1926) pp. 79-115; Grigg in *International Affairs*, xiv. (1935) pp. 176-186.

1925, which comprised four 'Arbitration Conventions' between Germany and each of the following four States, namely, Belgium, France, Czechoslovakia, and Poland. Each of these Conventions, in addition to the compulsory reference of disputes (failing normal methods of diplomacy) between the two parties 'as to their respective rights' (commonly called 'justiciable' disputes) to an arbitral tribunal or the Permanent Court of International Justice, provided that these disputes *may*, by agreement between the two parties, and all other disputes (not settled by the normal methods of diplomacy) *must*, be submitted 'with a view to amicable settlement' to a Permanent Conciliation Commission constituted in advance. Failing successful conciliation, disputes between the parties 'as to their respective rights' were to be submitted by special agreement either to the Permanent Court of International Justice or to an arbitral tribunal. Other ('political') disputes were, if conciliation failed, to be submitted, at the request of either party, to the Council of the League to be dealt with in accordance with Article 15 of the Covenant.<sup>1</sup>

§ 25a<sup>7</sup>. There exist a number of treaties in which the provision of machinery of conciliation does not have the effect of excluding, in the last resort, any disputes from the scope of binding settlement. It is a common feature of these treaties that disputes which the procedure of conciliation has failed to settle must be submitted to arbitration or judicial settlement terminating with a binding award or decision. These treaties differ one from the other in details—in particular in regard to the order in which conciliation and arbitration (or judicial settlement) have to be resorted to, as well as in respect of the sources of decision to be given by the body adjudicating with binding effect upon disputes which conciliation has failed to

Conciliation as Preliminary to Binding Settlement of All Disputes.

<sup>1</sup> The obligations of these treaties were disregarded by Germany in 1938 in relation to Czechoslovakia and in 1939 in relation to Poland. They are now merely of historical importance. Previously, Germany denounced, on March 7, 1936, the 'Rhine Pact of

Locarno' on the alleged ground that it had been violated by France as the result of the Franco-Russian Treaty of Mutual Assistance of May 2, 1935: Cmd. 5118 (1936), p. 5; *Off. J.*, 1936, p. 336.

settle. Three principal groups of these treaties may be distinguished:

(1) A number of treaties provide for conciliation, in the first instance, of all disputes. If conciliation fails to produce a settlement acceptable to both parties, then the dispute must be submitted for binding adjudication. Some of these treaties, like the important Treaty between Italy and Switzerland of September 20, 1924,<sup>1</sup> confer that function of final adjudication upon the Permanent Court of International Justice. This and similar treaties give the Court the very wide power of deciding such disputes *ex aequo et bono* if in its opinion they are not of a juridical nature.<sup>2</sup> Other treaties, *e.g.* the Treaty between Poland and Denmark of April 23, 1926, submit all disputes to the procedure of conciliation, to be followed by arbitration in case the report of the Conciliation Commission is not accepted by the parties.<sup>3</sup> Others still, *e.g.* the Treaty between Colombia and Switzerland of August 20, 1927,<sup>4</sup> provide for preliminary conciliation of all disputes, to be followed if necessary by arbitration of non-legal disputes and a decision of the Permanent Court of International Justice in case of legal disputes.

(2) Another group of treaties, *e.g.* between Belgium and Sweden of April 30, 1926,<sup>5</sup> while not imposing the duty of conciliation in regard to legal disputes,<sup>6</sup> make that procedure obligatory for non-legal disputes. If conciliation fails to produce a settlement, then the dispute must be sub-

<sup>1</sup> *L.N.T.S.*, xxxiii. p. 92; Diers in *R.I.*, 3rd ser., vi. (1925) pp. 1-16; Terza in *Rivista*, xvii. (1925) pp. 254-266. And see generally on the method of the Swiss treaties, Gavrilović, *L'organisation des commissions de conciliation d'après les traités suisses* (1932); Schindler in *R.I.*, 3rd ser., vi. (1925) pp. 816-887; Gorgé, *ibid.*, vii. (1926) pp. 633-676, and viii. (1927) pp. 58-106.

<sup>2</sup> Similar treaties have been concluded between Italy and Spain, August 7, 1926, *L.N.T.S.*, 47, p. 375; Spain and Switzerland, April 20, 1926, *ibid.*, 40, p. 30; Switzerland and Greece, September 21, 1925, *ibid.*, 47, p. 188.

<sup>3</sup> *L.N.T.S.*, 61, p. 247. It will be

noted that this and similar treaties dispense altogether with the traditional distinction between legal and political disputes.

<sup>4</sup> *L.N.T.S.*, 111, p. 230.

<sup>5</sup> *L.N.T.S.*, 47, p. 93. See also, to the same effect, the treaty between France and Switzerland of March 3, 1928, *ibid.*, 107, p. 31; between Sweden and Spain of April 26, 1928, *ibid.*, 77, p. 79.

<sup>6</sup> That procedure may, however, be resorted to by common agreement of the parties prior to judicial proceedings. Identical provisions for optional conciliation will be found in most treaties which do not provide for compulsory conciliation of 'legal' disputes.

mitted for a binding decision to an arbitral tribunal deciding *ex aequo et bono*. This is obviously a very far-reaching commitment conferring in fact legislative powers upon the arbitral tribunal, but the solution adopted seems to be consistent with principle.<sup>1</sup> As it is only the so-called political disputes—i.e. disputes which *ex hypothesi* cannot be decided by reference to rules of law—which are submitted to arbitral procedure it is clear that the only basis of the decision can be an extra-legal one. The same consistency is absent from a number of treaties concluded by the Scandinavian countries and others, which provide that the 'political' disputes if not settled by conciliation must be submitted for an award of an arbitral tribunal not having, however, the power to decide *ex aequo et bono*.<sup>2</sup> This confusion constitutes also the prominent feature of—

(3) the General Act for the Pacific Settlement of International Disputes of 1928. This Convention, which is now binding<sup>3</sup> upon over twenty States—including Great Britain, the British Dominions, and France—originated with the Committee on Arbitration and Security which the Preparatory Committee of the Disarmament Conference established in November 1927.<sup>4</sup> It was felt that a successful outcome of the Conference was to a large extent conditioned by the

<sup>1</sup> No expression of opinion is here intended on the adequacy of conferring either upon the Permanent Court of International Justice or upon an arbitral tribunal, by a general as distinguished from a special treaty, the power to decide upon the basis of other than legal rules. Such agreements, provided that their implications are realised, signify a determined desire for pacific settlement not only of disputes concerning existing rights but also of claims for the change of the existing law. They confer upon the judicial or arbitral body legislative powers with which States have so far been unwilling to entrust either the organs of the League of Nations or of international conferences. Such general agreements conferring these wide powers upon the Court or the arbitral body may also be open to objections that they tend to obliterate the borderline between the legislative and the judicial functions.

<sup>2</sup> See, e.g., the Treaty between Belgium and Switzerland of February 5, 1927, *L.N.T.S.*, 56, p. 47; between Finland and Norway of February 3, 1927, *ibid.*, 60, p. 368.

<sup>3</sup> With substantial reservations; see below, p. 83, n. 1.

<sup>4</sup> That Committee discussed in detail and produced a number of memoranda on various aspects of arbitration and 'security' (an expression which has almost become a term of art, and can probably be best described as a system of obligations to enforce by common international action the existing limitations upon the right to go to war). See the Minutes of the First Session of 1927: C. 667. M. 225. 1927. IX. The Second Session produced reports on arbitration and security (by M. Holsti), on the juridical elements of security (by M. Politis), and on the interpretation of Articles 10, 11, and 16 of the Covenant (by M. Rutgers)—all printed



acceptance of obligations of binding pacific settlement of all categories of disputes.<sup>1</sup> At the same time, however, the authors of the General Act were still under the influence of the traditional distinction between legal and political disputes with its underlying assumption that some categories of disputes are inherently unsuitable for commitments of binding settlement by an international agency. To this adherence to the accepted terminology there was added the wish to provide for the binding settlement of 'non-justiciable' disputes, a desire which, in turn, was coupled with the determination not to confer upon the arbitral body entrusted with the settlement of 'political' disputes the power to alter existing rights under International Law. The result is an international document which is free neither from inconsistencies nor from a substantial degree of unreality.<sup>2</sup>

as annexes to the Minutes of the Second Session of the Committee: C. 165. M. 50. 1928. IX.; also in Doc. C.A.S. 10. The Third Session of the Committee produced, in addition to the draft of the General Act, three model bilateral conventions of conciliation, arbitration, and judicial settlement, and three model treaties of mutual assistance and non-aggression. All these texts were approved by the Ninth Assembly in 1929. See League Doc. A. 86 (1), 1928. IX. For comment on the 'Model Treaties' see Fischer Williams in *B.Y.*, 1929, pp. 14-22, and in *Journal of the Royal Institute of International Affairs*, vii. (1928) pp. 407-421. See for an account and analysis of the work of the Committee: Rolin in *R.I.*, 3rd ser., viii. (1927) pp. 583-625; Rousseau in *R.G.*, xxxv. (1928) pp. 377-410; Toynbee, *Survey*, 1928, pp. 81-93. And see on the question of security in relation to arbitration and disarmament Wheeler-Bennett and Langermann, *The Problem of Security* (1927); Williams, *State Security and the League of Nations* (1927); Hoijer, *La sécurité internationale et ses modes de réalisation*, 4 vols. (1930); Rafaat, *Le problème de la sécurité internationale* (1930); Tabacovici, *Sécurité et désarmement* (1932); Jessup, *International Security* (the American rôle) (1935); *Traité Politiques. Recueil de*

*Documents. Documentation relative au développement de la question de la sécurité dans le cadre de la Société des Nations*. Edited and annotated by von Gretschaninow, vol. i. 1920-1927 (1936); vol. ii. 1927-1935 (1938); McNair, *Collective Security* (An inaugural lecture, 1935), reprinted in *B.Y.*, xvii. (1936) pp. 150-164; Eagleton, *Analysis of the Problem of War* (1937); Bourquin in *Hague Recueil*, 49 (1934) (iii.), pp. 473-541; Lauterpacht in *Politica*, 1936, pp. 133-155. See also *International Studies Conference: Collective Security*, edited by Bourquin (1936) and Swöbel, *L'Angleterre et la sécurité collective* (1938).

<sup>1</sup> See Memorandum of the British Government on the proposed accession to the General Act, Misc. No. 8 (1931), Cmd. 3803.

<sup>2</sup> The General Act was approved by a Resolution of the Assembly of September 26, 1928, inviting members of the League to become parties to that instrument and to the other model treaties. It was to enter into force as soon as two States adhered to it. See *Off. J.*, Special Suppl. No. 63, p. 17. For the text of the General Act see Treaty Series, No. 32 [1931]; *L.N.T.S.*, 93, p. 343; *Documents*, 1928, p. 15; Hudson, *International Legislation*, iv. p. 2529. The British ratification was deposited on May 21, 1931.

The General Act consists of three chapters dealing, respectively, with conciliation, judicial settlement, and arbitration.<sup>1</sup> Chapter I. (Conciliation) provides for the submission to conciliation of all disputes which it has not been possible to settle by diplomatic means (Article 1). But this must be read subject to Article 20, which lays down that in disputes with regard to which parties are in conflict as to their respective rights (legal disputes) conciliation is applicable only if both parties agree. This chapter contains detailed provisions as to the appointment of conciliation commissions, which may be rendered permanent at the request of one party; as to bringing of disputes before the commission; as to the general features of its procedure; and as to its function, which is 'to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement' (Article 15). The commission 'may, after the case has been examined, inform the Parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision' (*ibid.*). Chapter II. (Judicial Settlement) covers disputes with regard to which the parties are in conflict as to their respective rights. These disputes must be submitted to the Permanent Court of International Justice or, if the parties so agree, to an arbitral tribunal. In Chapter III. (Arbitration) an attempt is made to solve the question of disputes other than those falling within the purview of Chapter II. which the procedure of conciliation has failed to settle. Such disputes may be submitted to an arbitral tribunal by a special agreement of both parties or, failing that, by a unilateral application of one of the parties. The crucial question as to what shall be the rules applicable to the decision of disputes other than those as to rights is answered in Article 28: 'If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance

<sup>1</sup> According to Article 38, States and II., or only to Chapter I. Most States have adhered to all parts of the Act.  
may adhere either to the whole instrument, or only to Chapters I.

of the disputes enumerated in Article 38 of the Statute of the Permanent Court of International Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*.<sup>1</sup> This vital provision has been subjected to much criticism on the ground that disputes which are not concerned with legal rights cannot possibly be decided on the basis of the rules of law enumerated in Article 38 of the Statute.<sup>1</sup>

The General Act introduced two innovations to which attention ought to be drawn. First, it laid down, in Article 39, that no reservations other than those referring to classes or categories enumerated therein may be appended by

<sup>1</sup> The authorisation to decide *ex aequo et bono* is not believed to be helpful, seeing that it is not clear what is meant by the absence of rules of International Law applicable to the case. For a criticism of Article 28 and, generally, for an analysis of the General Act see Lauterpacht, *The Function of Law*, pp. 40-42, 374-378; Toynbee, *Survey*, 1931, pp. 246-254; Cory, *Compulsory Arbitration of International Disputes* (1932), pp. 145-152; Lorch, *Die Abgrenzung der internationalen Streitigkeiten in der Genfer Generalakte* (1934); Faraggi, *L'Acte Général d'Arbitrage* (1935); Brierly in *B.Y.*, 1930, pp. 119-133; Descamps in *R.I.*, 3rd ser., x. (1929) pp. 159-216, and xi. (1930) pp. 62-89; Muûls, *ibid.*, xi. (1930) pp. 689-695; Gallus, *ibid.*, pp. 190-246, 413-472, 879-925; Ch. de Visscher, *ibid.*, xiv. (1933) pp. 410-420; Wehberg in *Hague Recueil*, 1925 (ii.), pp. 55-78; Borel, *ibid.*, 1929 (ii.), pp. 501-595; Le Fur, *ibid.*, 1932 (iii.), pp. 518-526; Fischer Williams in *Journal of the Royal Institute of International Affairs*, vii. (1928) pp. 377-424; Gonsiorowski in *A.J.*, xxvi. (1933) pp. 469-490; Berlia in *R.I. (Paris)*, xx. (1937) pp. 104-113.

It would appear that the authors of the General Act were undecided as to the function of arbitration as provided in Chapter III. They seem to have endowed the arbitral tribunal with the power both to apply International Law and to legislate. This conception of the function of arbitration is probably the result of

the scientifically inaccurate opinion that arbitration can be partly a judicial and partly a non-judicial process, and of the historically false view that arbitration has in the past actually constituted such a mixture of functions. As, according to what is believed to be the correct view, there exist rules of International Law for a legal adjudication upon every claim, the phrase in Article 28 referring to the nature of the rules applicable to the dispute may mean that the arbitrator is entitled to disregard them on the ground that they are not 'applicable' either because one of the parties admittedly does not rely on law or because a legal decision would be politically unsatisfactory. The result has been that while some believe that Article 28 empowers the arbitral tribunal to change existing law, others see in it an instrument for the full vindication of the existing legal position. See, e.g., the Report by M. Politis at the Ninth Assembly (*Meetings of the First Committee*, p. 62). The question of the provision of a suitable machinery for disposing of conflicts arising out of claims for a change in existing International Law is too difficult to admit of a solution by a verbal formula.

On the proposed equity tribunal see Friedmann, *The Contribution of English Equity to the Idea of an International Equity Tribunal* (1935) and Schwarzenberger, *William Ladd: An Examination of an American Proposal for an International Equity Tribunal* (1935). And see above, p. 24, n. 2.

States acceding to the Act. This provision excludes indefinite reservations like those referring to national honour or independence, but is not otherwise effective in the direction of eliminating comprehensive reservations<sup>1</sup>; secondly, the parties to it agree to be bound by the provisional measures indicated in the course of arbitral or judicial proceedings (Article 33).<sup>2</sup>

## VIII

### THE LEAGUE OF NATIONS AND STATE DIFFERENCES

Pollock, *The League of Nations* (2nd ed., 1922)—Hyde, ii. § 585—Fauchille, §§ 970 (21)-970 (29), 970 (52)-970 (53)—Hoiijer, pp. 368-480—Barandon, pp. 47-91, 126-166—Balladore Pallieri, pp. 51-74—Knubben in Strupp, *Wörterbuch*, iii. pp. 1151-1187—Schücking und Wehberg, *Die Satzung des Völkerbundes* (1924), pp. 467-600—Schücking, *Vermittlung*, pp. 205-274—Garner, *Developments*, pp. 549-563—Gralinski, *Le règlement pacifique obligatoire des différends internationaux, suivant le Pacte de la Société des Nations* (1925)—Gonsiorowski, *La Société des Nations et problème de la Paix*, ii. (1927) pp. 326-395—Philippe, *Le rôle du Conseil de la Société des Nations dans le règlement pacifique des différends internationaux* (1928)—Conwell-Evans, *The League Council in Action* (1929)—Carena, *La competenza del Consiglio della Società delle Nazioni nelle controversie internazionali* (1929)—Binter, *Das Verhältnis von Vermittlung und Schiedsgerichtsbarkeit nach dem Völkerbundpakt* (1929)—Dotremont, *L'arbitrage international et le Conseil de la Société des Nations* (1929)—Massart, *Le Controverse internationale dinanzi al Consiglio della Società delle Nazioni* (1929)—Ray, *Commentaire du Pacte de la Société des Nations* (1930), pp. 373-498—Guggenheim, *Der Völkerbund* (1932)—Grob, *Die Kompetenzen des Völkerbundsrates und der Völkerbundsversammlung zur Streitschlichtung und Kriegsverhütung* (1933)—Zancla, *Il procedimento di mediazione e di conciliazione avanti al Consiglio* (1933)—Yepes and Pereira da Silva, *Commentaire du Pacte de la Société des Nations*, ii. (1935) pp. 1-98, 209-256—

<sup>1</sup> The British reservations to the General Act include all the reservations appended to the Optional Clause, to which there were added some others of a procedural character intended to facilitate recourse to the Council of the League prior to submission to one of the agencies provided by the General Act. For the text and criticism of these reservations see Briery in *B.Y.*, 1931, pp. 132-135, and *Documents*, 1931, p. 92.

In February 1939 Great Britain, while renewing her signature of the

General Act for a further period of five years, beginning on August 16, 1939, added a further reservation to the effect that her participation in the General Act would not cover disputes arising out of events occurring during any war in which Great Britain may be involved in the future. The reservation, it was stated, applies also to the procedure of conciliation: *Cmd.* 5947. Misc. No. 2 (1939). France made an identical declaration.

<sup>2</sup> See above, p. 64, n. 1.

Göppert, *Der Völkerbund* (1938), pp. 298-350, 384-421—Mandelstamm in *Hague Recueil*, 1926 (iv.), pp. 337-643—Mantoux in *International Affairs*, v. (1926) pp. 16-31—Ch. de Visscher in *R.I.*, 3rd ser., ix. (1928) pp. 243-262—Rauchberg in *Hague Recueil*, 1931 (iii.), pp. 87-200—Meucci in *Rivista*, xxiv. (1932) pp. 83-98.

The  
League of  
Nations as  
a Factor in  
State Dif-  
ferences.

§ 25b. Negotiation between the parties, with or without the aid of a Commission of Inquiry, good offices or mediation of third States, and arbitral awards—these were the only amicable means available for the settlement of State differences before the World War. There was no organised body to detect the early growth of disputes and by timely action to avert armed conflict. No aid was tendered to the parties at issue unless they themselves sought it, or unless one or more States had sufficient interest, initiative, and prestige to offer their services. The establishment of the League of Nations introduced a radical change in this respect. For the Covenant charges the League itself with special duties, and lays new obligations upon the individual members, which are designed to secure the peaceful settlement of differences.

The  
Duties  
of the  
League  
itself.

§ 25c. By Article 11 any war<sup>1</sup> or threat of war, whether immediately affecting any of the members of the League or not, is declared to be a matter of concern to the whole League. Upon the request of a member the Secretary-General<sup>2</sup> must in such an emergency forthwith summon a meeting of the Council, including the representatives of the parties to the dispute, if they are not already members of the Council.<sup>3</sup> The League 'shall take any action that may be deemed wise and effectual to safeguard the peace of nations.'<sup>4</sup> Upon the means to be employed there is no

<sup>1</sup> On the danger resulting from the use of the technical term 'war' throughout the Covenant, and particularly in Articles 11, 12, 13, 15, and 16, see literature cited below, § 52a.

<sup>2</sup> For a valuable account of the functions of the Secretary-General and of the President of the Council under Article 11 see Barandon, pp. 62-72.

<sup>3</sup> And see *Off. J.*, 1931, pp. 2322, 2323, for a decision of the Council, taken under Article 11 as matter of procedure by a majority vote to invite a representative of the United States to join in its deliberations in connec-

tion with the Manchurian dispute. See Cooper, *American Consultation in World Affairs* (1934).

<sup>4</sup> As was done in the Greco-Bulgarian dispute in 1925, or in Iraq boundary dispute (for the report of the Commission see Doc. C. 400. M. 147), or in 1933 in the dispute between Bolivia and Paraguay (Toynbee, *Survey*, 1933, p. 422), or in December 1931 in the Manchurian dispute, *Off. J.*, 1931, p. 2374. See also the Report on Article 11, *Off. J.*, 1927, p. 832.

other limitation than this; accordingly, they may consist of good offices, or mediation, or conciliation, or investigation by a special commission of inquiry, or of one of the methods of compulsion described in the next chapter.<sup>1</sup> Under the

The contrary view assumes that the wide powers conferred upon the League in that article must not be taken literally; that mediation, persuasion, and conciliation constitute its fundamental and exclusive feature; that it does not, accordingly, admit of any coercive action; and that it is for that reason governed by the overriding principle of unanimity, including the votes of the parties to the dispute (see, e.g., Fischer Williams, *Some Aspects of the Covenant of the League of Nations* (1934), pp. 125-135; Barandon, pp. 76-81, 89-91; Kurz, cited below, p. 86). This apparently was not the interpretation of the Council and of the Assembly when in 1927 (see *Off. J.*, 1927, p. 832, and Special Suppl. No. 53, 1927, p. 23) they approved a report of the Committee of the Council on Article 11 which envisaged coercive measures against the recalcitrant State, including withdrawal of diplomatic representatives, naval and air demonstrations, and 'other measures of a more serious character.' But it seems that the Council subsequently took a different view of its powers under Article 11. When in October 1931, in the initial stages of the Sino-Japanese dispute concerning Manchuria (see below, § 52aa), the Council voted on a resolution calling upon Japan to withdraw her troops from Manchuria, the Council and its President were of the view that that resolution lacked legal validity in view of the fact that the Japanese representative voted against it (see *Off. J.*, 1931, p. 2340). The proper view is believed to be the one which distinguishes between the powers of the Council as to the substance of the dispute submitted to it and as to securing observance of the duties of pacific settlement under the Covenant. The first requires absolute unanimity of all its members (see the dictum of the Permanent Court of International Justice in the *Peter Pázmány* University case, Series A/B, No. 61, p. 243); the second does not. Thus, for instance, when the Council

acting under Article 11 makes in a quasi-judicial capacity a pronouncement as to the compatibility with the Covenant of measures of force adopted by one party, the rule *nemo iudex in re sua*, laid down in another connection by the Court (see Advisory Opinion No. 12 (*Boundary between Turkey and Iraq*), p. 31), would probably apply. In support of the view that absolute unanimity may not be required under Article 11 see Conwell-Evans, *op. cit.*, p. 54; Schücking-Wehberg (3rd ed., 1930), pp. 514 *et seq.*; Lauterpacht in *Political Quarterly*, 1932, pp. 175-185. See also the Report of M. Udén of August 3, 1937, submitted to the Committee set up to study the application of the principles of the Covenant: Doc. A. 7. 1938. VII. pp. 99-112. See also *Off. J.*, Special Suppl. No. 154 (1936), pp. 66-71, for an analysis of the replies of the various Governments on the question of unanimity under Article 11. The British reply stated that the activities of the Council under that article had 'in the past been hampered by the assumption that the rule of unanimity must apply,' and foreshadowed the willingness of the British Government to co-operate in removing the anomaly. The French reply was on similar lines.

In this connection reference must be made to the General Convention to Improve the Means of Preventing War of September 27, 1931 (for the text see League Doc., 1932, ix. 17; *Documents*, 1931, p. 99). That Convention defines the powers of the Council for the case when in circumstances which, in the Council's opinion, 'do not create a state of war between the Powers at issue . . . the forces of one of those Powers enter the territory or territorial waters of the other or a zone demilitarised in virtue of international agreements, or fly over them.' In such cases the Council may—if necessary, without the concurrence of the parties to the dispute—prescribe measures to ensure the evacuation of the invaded territories. The

second paragraph of Article 11 each member has the 'friendly right'<sup>1</sup> to bring to the attention of the Assembly or the Council any circumstances affecting international relations which threaten to disturb international peace, or the good understanding between nations upon which peace depends. The terms of both paragraphs and the actual practice of the League justify the view that Article 11 is of considerable comprehensiveness.<sup>2</sup>

parties agree to 'carry out without delay the measures so prescribed' (Article 2). The Convention has so far been ratified only by a small number of States, not including any Great Power. On this Convention see Kurz, *L'Article 11 du Pacte et la Convention générale en vue de développer les moyens de prévenir la guerre* (1933); Toynbee, *Survey*, 1931, pp. 254-259, and *Documents*, 1931, pp. 97-99; Barandon, pp. 96-103; Philipse in *R.I.*, 3rd ser., xiii. (1932) pp. 664-686; Pierlinckhove, *ibid.*, pp. 861-885. On Article 11, in addition to the authors cited on p. 83 above, see in particular Kunz in *Hague Recueil*, 1932 (i.), pp. 683-789; and *Die intrasystematische Stellung des Art. XI. des Völkerbundpaktes* (1931); Barandon, pp. 47-115; Kurz, *op. cit.*; Fischer Williams, *op. cit.*; Guggenheim, *Les mesures provisoires de procédure internationale* (1931), pp. 81-198; Kopelmanas in *R.G.*, xlii. (1935) pp. 559-639.

<sup>1</sup> For an instance of the exercise of this 'friendly right' see the action of Great Britain in the case of the Aaland Islands dispute between Sweden and Finland in 1920. The Chaco dispute between Bolivia and Paraguay was brought before the Council, under Article 11, by a Council committee of three of its members: Toynbee, *Survey*, 1933, p. 419. In January 1934 Soviet Russia brought before the Council, under this paragraph, a complaint in connection with the decision of Uruguay to suspend diplomatic relations with Russia on account of alleged Communist propaganda in Uruguay. Subsequently Russia withdrew the matter from the Council. See *Off. J.*, 1936, and see Hyde in *A.J.*, xxx. (1936) pp. 284-287. The wide possibilities of Article 11 were demonstrated in another

sphere during the Spanish Civil War of 1936-1939. The Spanish Government repeatedly invoked that article in connection with the intervention of Italy and Germany in the Civil War. See *Off. J.*, 1937, p. 35, for the Spanish appeal in November 1936, and *ibid.*, p. 18, for the Resolution of the Council in December 1936. For further appeals and resolutions see *ibid.*, pp. 262, 363, 914, 944; *ibid.*, 1938, pp. 358, 533. See also Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (1939), pp. 121-143.

<sup>2</sup> It has even been contended that Article 11 becomes applicable after the procedure under Article 15 has failed to produce a settlement. It would appear that in such cases the general provisions of Articles 3 and 4 are more applicable. (See below, § 25e; Barandon, pp. 51-56.) The scope of the second paragraph of Article 11 was discussed at length in the course of the dispute between Great Britain and Finland in connection with the claim of Finnish subjects for compensation for the use of their ships by Great Britain in pursuance of an agreement with the Russian Government. A report of the Committee of the Council (presented on January 30, 1932) recognised that, contrary to the British view, the dispute might come within the scope of paragraph 2 of Article 11. The report is printed as Annex 1 in Treaty Series, No. 31 [1932]. See for the discussion before the Council the Minutes of the Council of September 1931 and May 1932. See also *Off. J.*, 1934, p. 1450, and *ibid.*, 1935, pp. 418-435. And see *ibid.*, p. 1436, on the dispute between the Swiss Confederation and France concerning reparation for damage suffered by Swiss citizens as a result of events during the World

§ 25d. The members of the League have by Article 12 agreed to refer any dispute between them likely to lead to a rupture either to arbitration or to judicial settlement or to inquiry by the Council, and not to resort to war until three months after the award or the judicial decision or the report by the Council. They have further agreed (Article 13) that any dispute 'which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy' shall be submitted to arbitration or judicial settlement; and the same Article (13) declares that 'among those which are generally suitable for submission to arbitration or judicial settlement' are the following: Disputes as to the interpretation of a treaty, as to any questions of International Law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach.

The Duty of Members involved in a Dispute. Inquiry and Conciliation by the Council.

Arbitration<sup>1</sup> means any kind of arbitration upon which the parties to the dispute may agree, whether under the Hague Convention or not<sup>2</sup>; and judicial settlement means a decision by the Permanent Court of International Justice established under Article 14 of the Covenant.<sup>3</sup> Moreover, by Article 13 the members of the League have agreed to carry out in full good faith any such award or decision, and not to resort to war against a member which complies therewith. In the event of the failure to carry out the terms of the award or of the decision it is the duty of the Council to propose what steps should be taken to give effect

War—a dispute in which the Council equally declared paragraph 2 to be inapplicable. For comment see Friedmann in *R.I. (Paris)*, xv. (1935) pp. 90-103, and Kunz in *New York University Law Quarterly Review*, xiv. (1937) No. 3. See also *Z.ö.V.*, v. (1935) pp. 633-646, and below, p. 348. See also *Off. J.*, 1928, p. 942, for a refusal of the Council to entertain proceedings under Article 11 in a dispute between Greece and Albania on the ground that the parties were bound to have recourse to the procedure under the Minorities Treaty.

<sup>1</sup> See above, § 17a.

<sup>2</sup> Schücking und Wehberg, pp. 516-534; Magyary, *Die internationale Schiedsgerichtsbarkeit in Völkerbünde* (1920); Hoijer, pp. 480-515; Barandon, pp. 120-125, 184-255; Schindler in *Hague Recueil*, 1928 (v.), pp. 273-361; Binter, *Das Verhältnis von Vermittlung und Schiedsgerichtsbarkeit nach dem Völkerbundpakt* (1929); Falikmann, *L'arbitrage dans la Société des Nations* (1932). And see the literature referred to above at the beginning of § 25b.

<sup>3</sup> See above, §§ 25ab-25ag.



thereto.<sup>1</sup> If, however, the parties adopt neither arbitration nor judicial settlement for the solution of a dispute likely to lead to a rupture, then, under Article 15, it must be submitted to the Council.<sup>2</sup>

A dispute, under that Article,<sup>3</sup> is brought before the Council<sup>4</sup> by notification by any party to the dispute to the

<sup>1</sup> For a consideration of that question by the Committee of Jurists in 1930 in connection with the amendment to the Covenant see League Doc. C. 160. M. 69. 1930. V. The question was discussed in the course of the dispute between Hungary and Roumania in 1928. See *Off. J.*, November 1934, p. 1432, for an instance of an appeal by Bulgaria to the Council on account of the alleged refusal of Greece to comply with an arbitral award.

<sup>2</sup> For an instance of communications addressed to the League in connection with a dispute but without submitting it for settlement by the League see the communications addressed to the League in September 1938 by Ecuador and Peru in connection with a territorial dispute between them: *Off. J.*, 1938, p. 1130.

<sup>3</sup> It was authoritatively established by the Council in 1932, in answer to the objection of Japan, that a State is entitled to invoke simultaneously Articles 11 and 15 (or, indeed, other Articles): *Off. J.*, 1932, pp. 340, 341. In her dispute with Japan, China invoked originally Article 11; she then extended her appeal to cover Articles 10 and 15. When in 1937 Japan invaded China and opened hostilities on a large scale, China invoked Articles 10, 11, and 17 of the Covenant: *Off. J.*, 1937, Special Suppl. No. 177, p. 6. In December 1939 Finland invoked against Russia Articles 11 and 15.

<sup>4</sup> It will be noted that Article 15 refers only to disputes 'likely to lead to a rupture.' There has been no tendency to give a too literal interpretation to these terms. The dispute concerning the Tunis and Morocco Nationality Decrees (see below, § 25*f*) was considered by the Council under Article 15. On the other hand, the Council acceded in June 1933 to the request of Bolivia to take action under Article 15 after, on May 10,

1933, Paraguay formally declared a state of war to exist with Bolivia: see Toynbee, *Survey*, 1933, pp. 417-434. Such an interpretation of Article 15 obviously constitutes the correct application of the general principle of law that a party cannot take advantage of its own wrong: see Publications of the Court, Series A, No. 9 (*Chorzów Factory*), p. 31; Series B, No. 15 (*Danzig Railway Officials*), p. 27. Paraguay strongly opposed that view: *Off. J.*, 1934, p. 846. In November 1934 the Assembly of the League adopted a unanimous report (*Off. J.*, 1934, Special Suppl. No. 132, pp. 47-51). While Bolivia accepted the Report the Advisory Committee of the Assembly held that the reply of Paraguay amounted to a rejection of the Report: *Off. J.*, Special Suppl. No. 133, p. 49. Subsequently it recommended that the prohibition of export of arms and munitions, hitherto applying to both belligerents, should not be enforced against Bolivia. See below, § 350, and, in particular, Pelloux in *R.G.*, xli. (1934) pp. 48-75, and xlii. (1935) pp. 146-155. For lists of references to the various League documents on the subject of this dispute see *Off. J.*, 1934, pp. 866 and 1527. And see Toynbee, *Survey*, 1930, pp. 421-435; 1933, pp. 393-438; Woolsey in *A.J.*, xxvi. (1932) pp. 796-801, and the same in *A.J.*, xxiv. (1930) pp. 122-126; Arbo in *R.G.*, xxxvi. (1929) pp. 528-553. For the Report of the League Commission in 1934 see League Doc. C. 154. M. 64, 1934. VII., and *A.J.*, xxviii. (1934), Suppl., pp. 138-217. As to the final settlement of the dispute with the assistance of the mediatory American States, see above, p. 10 and § 11*e* (n.). As to the Manchurian dispute, see below, § 52*aa*. See also the Report of the Council of March 1933, under Article 15, in the Leticia dispute between Colombia and Peru (League

Secretary-General, who thereupon will make all necessary arrangements for full investigation and consideration. Each party must communicate to him as promptly as possible statements of its case, with all relevant facts and papers.<sup>1</sup> Either party, by request made within fourteen days after the submission of the dispute, may require it to be referred to the Assembly<sup>2</sup>; and the Council may so refer it, even if no such request is made.<sup>3</sup> Otherwise it is for the Council, upon which all parties to the dispute are entitled to be represented<sup>4</sup> for the occasion, to act. Its functions under Article 15 are threefold: (i) to investigate the dispute; (ii) to endeavour to effect a conciliation; (iii) either unanimously or by a majority vote, to make and publish a report stating the facts of the dispute and containing recommendations for its settlement.<sup>5</sup> It may be necessary for the Council to have legal opinion upon the matter of the dispute, as was the case, under Article 11, in the Aaland Islands question in 1920, when the Council referred certain legal questions to a Committee of Jurists.<sup>6</sup> But since the establishment of the Permanent Court of International Justice, the more normal<sup>7</sup> method by which the Council obtains legal advice is, as we have seen,<sup>8</sup> to request the Court for an advisory opinion.

Doc. C. 194. M. 91. 1933. VII.), where the Council found that the situation brought about by Peru was not in accordance with the principles of the Covenant. See on this dispute Yepes in *R.I. (Paris)*, xi. (1933) pp. 133-171; Woolsey in *A.J.*, xxvii. (1933) pp. 317-324, and xxix. (1935) pp. 94-99; Le Fur in *R.G.*, xli. (1934) pp. 129-147; Toynbee, *Survey*, 1933, pp. 438-457. For a survey of boundary disputes between Latin-American States see Woolsey in *A.J.*, xxv. (1931) pp. 324-333.

<sup>1</sup> Article 15. The Council, if it appears desirable, may direct their immediate publication.

<sup>2</sup> This was done, on the fourteenth day, by China in her dispute with Japan on February 12, 1932. In summoning an extraordinary meeting of the Assembly, the Council affirmed its duty to continue its work for the maintenance of peace in accordance

with the Covenant: *Off. J.*, 1932, p. 371. As to the request of Bolivia in the course of the dispute with Paraguay, see Toynbee, *Survey*, 1933, p. 434, and *Off. J.*, 1934, p. 849.

<sup>3</sup> As to the procedure in this case see below, § 25e.

<sup>4</sup> Article 4.

<sup>5</sup> Unless the dispute is found by the Council to arise out of a matter of domestic jurisdiction; see below, § 25f.

<sup>6</sup> *Off. J.*, Special Supplements 1 and 3, August and October 1920.

<sup>7</sup> But there have been cases of reference to committees of jurists, e.g. in the Corfu incident: *Off. J.*, 1923, p. 1349; in the frontier (Maritza) dispute between Greece and Turkey: *Off. J.*, 1926, p. 520; in the *Salamis* case between Greece and Germany: *Off. J.*, 1927, p. 1404.

<sup>8</sup> See above, § 25ae.

The report of the Council cannot be put so high as an award of an arbitral tribunal; and it will be noticed that, whereas in Article 13 the members of the League have agreed that they will carry out in full good faith any award or judicial decision that may result from a reference to arbitration or to judicial settlement under Article 12, no such legal obligation is expressed in Article 15 as resulting from the Council's report (even when unanimous in the sense about to be explained), whatever the normal obligation may be. The effect of a report is as follows: if it is unanimously<sup>1</sup> agreed to by the members of the Council other than the representatives of one or more of the parties to the dispute, then all the members of the League agree not to go to war with any party to the dispute which complies with the recommendations of the report<sup>2</sup>; if, on the other hand, the Council fails to frame a report which is unanimously agreed to by all the members of the Council other than the representatives of one or more of the parties to the dispute, the members of the League 'reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.' In this last event resort to war does not amount to a breach of the Covenant,

<sup>1</sup> For the only instance of a report of the Council under Article 15 see the Report of March 18, 1933, in the dispute between Colombia and Peru: League Doc. C. 194. M. 91. VII.; *Off. J.*, April 1933, Part I, pp. 589-609. And see Toynbee, *Survey*, 1933, pp. 438-457. For other references to that dispute see above, p. 88, n. 4 (*in fine*).

<sup>2</sup> The obligation not to go to war with the State accepting the report of the Council or of the Assembly is not affected by the circumstance that prior to or in the course of the procedure under Article 15 war has already been declared (as was the case in the Chaco dispute between Paraguay and Bolivia) (see above), or acts of force have been committed which the other members of the League elect to regard as 'resort to war' contrary to the provisions of the Covenant. As the report acquires full validity as soon as it is adopted by the required unanimity (in the case

of the Council) or the required majority (in the case of the Assembly), the continuation of the war or of illicit acts of force against a State accepting the report constitutes *ex nunc* a breach of the Covenant. It was by reference to such a situation that the Advisory Committee set up by the Assembly to deal with the dispute between Paraguay and Bolivia after the acceptance of the Assembly's Report said that 'Paraguay must refrain from resorting to war with Bolivia' (Report of January 1935: *Off. J.*, Special Suppl. No. 133, p. 49). In her notice of withdrawal from the League Paraguay maintained that 'such a declaration is meaningless in the case of a war which has been proceeding for thirty-two months,' and that 'the prohibition of war is only applicable under the Covenant when the conflict has not yet developed into an armed struggle': *Monthly Summary*, February 1935, p. 30.

provided that, at any rate in the case of the parties to the dispute,<sup>1</sup> the moratorium of three months after the report by the Council required by Article 12 of the Covenant has taken place.<sup>2</sup> Any report by the Council must secure at least a majority ; but each member represented on it may publish on its own account a statement of facts and of its conclusions upon them.

§ 25e. But, as has been stated, a dispute may be transferred from the Council to the Assembly. In that case the same procedure is to be followed, 'the Assembly' being substituted in all references to 'the Council.' In practice the Assembly has in such cases delegated its functions, save the final adoption of the report, to a specially selected committee. Thus in the Sino-Japanese dispute in 1932 the Assembly set up a committee composed of nineteen members and including all the members of the Council.<sup>3</sup> But with regard to the report there is a difference. A report of the Assembly, in order to bind the members of the League not to make war against a party carrying out its recommendations, must be concurred in by the representatives of the members of the League represented on the Council and by the representatives of a majority of the other members, exclusive in each case of the representatives of the disputants.

Inquiry  
by the  
Assembly.

<sup>1</sup> It is not clear whether the moratorium of Article 12 is imposed upon all the members of the League or only upon the parties to the dispute.

<sup>2</sup> It was one of the main objects of the Protocol for the Pacific Settlement of International Disputes, adopted by the Assembly on October 2, 1924, commonly called the 'Geneva Protocol,' to stop up this 'loophole for war' in the Covenant by introducing amendments into that document. The fact that the Protocol failed to secure the number of ratifications necessary to make it effective was largely due to the opposition of Great Britain, and that opposition was mainly due to two views that, there being no machinery, or no effective machinery, for the revision under Article 19 of the Covenant of treaties which have become inapplicable, the Protocol would involve its adherents in a guarantee of the *status*

*quo*, however unjust and precarious it might be. See the Reports of M. Politis and M. Benes, Rapporteurs of the First and Third Committees of the Fifth Assembly (Cmd. 2273 of 1924); and *Rivista*, 3rd ser., iii. (1924) pp. 493-534; Hoijer, pp. 516-556; Fauchille, §§ 970 (56)-970 (62); Schücking, *Das Genfer Protokoll* (1924); Baker, *The Geneva Protocol* (1925); Miller, *The Geneva Protocol* (1925); Rauchberg, *Das Genfer Friedensprotokoll* (1925); Gonsiorowski, *La Société des Nations et problème de la Paix*, ii. (1927) pp. 448-485; Dotremont, *L'arbitrage international et le Conseil de la Société des Nations* (1929), pp. 210-252; Wehberg in *Hague Recueil*, 1925 (ii.), pp. 5-149; Sottile in *R.I. (Geneva)*, ii. (1924) pp. 227-263; Erich in *R.I.*, 3rd ser., v. (1924) pp. 509-547.

<sup>3</sup> Resolution of March 11, 1932, League Doc. A. (Extr.) C.G. 1 (1).

The adoption of the unanimous report, either by the Council or by the Assembly, and its rejection by one of the parties, do not mark the end of the action of the League. It is probable that there remains always the comprehensive jurisdiction under Article 11<sup>1</sup>—not, of course, for a repetition of the procedure on the merits, but with a view to preventing recourse to force. Moreover, under paragraph 3 of Article 3 and under paragraph 4 of Article 4 of the Covenant, the Assembly and the Council may deal 'with any matter within the sphere of action of the League or affecting the peace of the world.' Thus in the dispute between China and Japan, after the latter had voted on February 24, 1933, against the unanimous report of the Assembly (subject to the abstention of Siam), the Assembly adopted a resolution appointing an Advisory Committee 'to follow the situation, to assist the Assembly in performing its duties under Article 3, paragraph 3, and, with the same objects, to aid the members of the League in concerting their action and their attitude among themselves and with non-member States.'<sup>2</sup> That Committee also dealt with the situation which arose out of the invasion of China by Japan in 1937.<sup>3</sup> The same action was taken after the rejection of the Report of the Council by Peru in the dispute with Colombia in March 1933,<sup>4</sup> as well as in the disputes between Paraguay and Bolivia in November 1934,<sup>5</sup> and between Finland and Russia in December 1939.<sup>6</sup>

Matters of  
Domestic  
Jurisdiction.

§ 25f. Paragraph 8 of Article 15 imposes an important limit upon the jurisdiction of the Council and of the Assembly. It reads as follows: 'If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by International Law is solely

<sup>1</sup> See the reports of Rutgers (Nos. 151-153) and of de Brouckère (Annexes to Doc. C. 165. M. 50. 1928. IX.); and see Barandon, pp. 52-56; Conwell-Evans, *op. cit.*, pp. 228-240. That mere submission under Article 15 does not oust the Council's jurisdiction under Article 11, see *Off. J.*, 1934, p. 850, this being the view of the Council in the dispute between Bolivia and Paraguay.

<sup>2</sup> *A.J.*, xxvii. (1933), Special Suppl., p. 152; Toynbee, *Survey*, 1933, p. 510.

<sup>3</sup> *Off. J.*, 1937, Special Suppl. No. 177, p. 5. And see below, pp. 96, 130.

<sup>4</sup> *Off. J.*, 1933, p. 525; Toynbee, *Survey*, 1933, p. 451; Woolsey in *A.J.*, xxix. (1935) pp. 95, 96.

<sup>5</sup> See *Off. J.*, Special Suppl., Nos. 132 and 133. And see below, § 52f.

<sup>6</sup> See below, p. 137.

within the domestic jurisdiction of that party,<sup>1</sup> the Council<sup>2</sup> shall so report, and shall make no recommendation as to its settlement.<sup>3</sup>

There are certain things which a State may do which no other State may call in question. Apart from treaty obligation, it may, for instance, exclude all immigrants or immigrants of a particular class, or even immigrants of a particular nationality; though the exclusion of the last category might be an unfriendly act and a breach of comity, it is not an international delinquency.<sup>3</sup> Again, apart from treaty obligation, it may, within certain limits prescribed by customary International Law, treat its aliens at discretion,<sup>4</sup> for instance, by excluding them from the exercise of certain trades or professions or from the ownership of certain property; it may impose such conditions for the acquisition of its nationality by naturalisation as may seem fit to it; and it may impose whatever tariff regulations seem most conducive to its own interests.

The principal juristic interpretation of paragraph 8 of Article 15<sup>5</sup> was given in 1923, in the case of the dispute

<sup>1</sup> French text: 'que le droit international laisse à la compétence exclusive de cette partie.'

<sup>2</sup> The final paragraph of Article 15 imposes the same limitation upon the jurisdiction of the Assembly. It is only the power to make recommendations for a settlement which is ousted by a successful claim by one of the disputants that the matter is within its domestic jurisdiction. The function of conciliation remains; but the function of investigation is not likely to be exercised once the claim of domestic jurisdiction has been allowed.

See Schücking und Wehberg, pp. 575, 576, 589-592; Barandon, pp. 135-143; Van Deth, *Étude sur l'interprétation du paragraphe 8 de l'article 15 du Pacte* (1928); Ullmann, *Die ausschliessliche Zuständigkeit der Staaten nach dem Völkerrecht* (1933); Thadden, *Der vorbehaltene Betätigungsbereich der Staaten* (1934); Castberg in *R.I.*, 3rd ser., iii. (1922) pp. 195-202; Paulus in *R.I. (Geneva)*, 1924, pp. 123-138; Brierly in *B.Y.*, 1925, pp. 8-19; Garner in *American Political Science Review*, February

1925, pp. 1-24; Fenwick in *A.J.*, xix. (1925) pp. 143-147; Politis in *Hague Recueil*, 1925 (i.), pp. 43-76; *B.Y.*, 1926, pp. 185-189; Charteris in *B.Y.*, 1929, pp. 185-189; Bruns in *Z.ö.V.*, i. (1929) pp. 31-50; Baty in *R.I.*, 3rd ser., x. (1929) pp. 44-51; Rundstein, *ibid.*, xii. (1931) pp. 676 et seq.; Le Fur in *R.I. (Paris)*, viii. (1931) pp. 94-127 and in *Annuaire*, xxxvi. (1931) pp. 213-220; Monaco in *Rivista*, xxiv. (1932) pp. 36-52, 161-183; Kelsen in *Hague Recueil*, 1932 (iv.), pp. 304-311; Scelle, *R.I.*, 3rd ser., xiv. (1933) pp. 365-394; Segal, *ibid.*, pp. 704-725, and xv. (1934) pp. 25-43.

<sup>3</sup> See vol. i. § 314.

<sup>4</sup> See vol. i. § 321.

<sup>5</sup> The Aaland Islands dispute between Sweden and Finland in 1920 was brought before the League by virtue of Article 11. It seems that there was, at that time, no disposition to question that the exception of paragraph 8 of Article 15 applies also to Article 11: see *Off. J.*, 1920, pp. 247-249. And see *Off. J.*, Special Suppl. No. 3 (October 1920).

between France and Great Britain as to the French Nationality Decrees in Tunis and Morocco (French zone), which sought to impose French nationality (and by consequence compulsory military service in the French army) upon all persons born in those French protectorates of parents one of whom was also born there, including certain British subjects. The Permanent Court of International Justice, in response to the request of the Council, gave an advisory opinion,<sup>1</sup> from which the following passages may be cited :

‘The words “solely within the jurisdiction” seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by International Law. As regards such matters each State is sole judge.’

‘The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question ; it depends upon the development of international relations. Thus, in the present state of International Law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.’

But a State may have entered into treaty obligations, the effect of which is to remove the matter in dispute from the reserved domain into the arena of International Law, as the Court held the effect of the treaty obligations to be in this case. Accordingly, the French claim to oust the jurisdiction of the Council was rejected, and, once it was thus established that the matter was one for regulation by International Law, the parties settled their difference by diplomatic means.<sup>2</sup> The Opinion of the Court demonstrates that the wider International Law extends its scope, the narrower will the reserved national domain become. Apart from the natural process of extension of that scope, a strong tendency in the same direction results from the increasing practice of regulating by treaty matters which were formerly exclusively national.

<sup>1</sup> Series B, No. 4, at pp. 23-24. See also the third question put to the Committee of Jurists after the Corfu affair, and their answer : *Off. J.*, April 1924, p. 524 ; *B.Y.*, 1924,

p. 180 ; *A.J.*, xviii. (1924) pp. 537 and 540.

<sup>2</sup> Hurst in *B.Y.*, 1923-1924, pp. 175-179. And see the literature referred to above, p. 71, n. 9.

§ 25g. Disputes may arise between a State which is, and Disputes in which non-members are involved. a State which is not, a member of the League, or between two States neither of which is a member. In either event, the State or States which are not members of the League Article 17. are to be invited to accept the obligations of membership for the purposes of the dispute upon such conditions as the Council may deem just ; upon the acceptance of the invitation, Articles 12 to 16 of the Covenant will apply, with such modifications as the Council may consider necessary, and the Council will immediately institute an inquiry into the circumstances of the dispute, and recommend such action as may seem best and most effectual under the circumstances.

If for the purposes of a dispute between a member and a non-member the non-member refuses to accept the obligations of membership, and resorts to war against the member, it is to be subjected to the same measures as a member-State which breaks its covenants.<sup>1</sup> If neither party to a dispute is a member of the League, and both refuse to accept the obligations of membership for the purposes of the dispute, the Council may—not must—take such measures and make such recommendations as will prevent hostilities and result in the settlement of the dispute. No special provision seems to have been made for the case in which one party consents and the other refuses to accept the obligations of membership ; but it is arguable that this case is covered by paragraph 3 of Article 17, the accepting State having by its acceptance become a temporary member of the League. In the dispute between Finland (a member of the League) and Russia (not a member) in 1922-1923 regarding the autonomy of Eastern Carelia which Finland brought to the attention of the League, the Council caused inquiries to be made with the Russian Government whether it would consent to submit the question to the Council under Article 17 and ‘to cause itself, for that purpose, to be represented on the Council.’ This Russia declined to do. The Council thereupon requested the Permanent Court of International Justice to give an advisory opinion upon

<sup>1</sup> See below, §§ 52d, 66a.



the principal legal issue involved, which the Court by a majority declined, in the absence of Russia, to do.<sup>1</sup>

When, following upon the invasion of her country by Japan, in 1937, China invoked Article 17 of the Covenant,<sup>2</sup> the Council addressed to Japan an invitation to comply with the obligations devolving upon the members of the League for the settlement of their disputes. After that invitation had been rejected the Council adopted a report laying down: (a) that, in principle, it was for the members of the League to appreciate whether the conditions required for the application of Article 16 and Article 17(3) were fulfilled; (b) that, in the present case, the Assembly had already found that the action of Japan in China was unlawful<sup>3</sup>; and (c) that, accordingly, the provisions of those articles were applicable and the members of the League were entitled to adopt individually the measures provided for in Article 16.<sup>4</sup>

## IX

### REDUCTION AND LIMITATION OF ARMAMENTS

Bentham, *Principles of International Law* (1786-1789) in *Works* (1843), ii. pp. 546-560—Lorimer, ii. pp. 246-260—Hall, § 119a—Nys, iii. pp. 26-28—Schücking und Wehberg, pp. 388-449—Liszt, § 51—Barandon, pp. 361-384, 395-410—Hadjisicos, *Les sanctions internationales de la Société des Nations* (1920), pp. 139-163—Picard, *La question de la limitation des armements* (1921)—Wright, *The Limitation of Armaments* (1921)—Wehberg, *Die internationale Beschränkung der Rüstungen* (1921), and the same, *The Limitation*

<sup>1</sup> Series B, No. 5, particularly at pp. 27-29—on the ground that no State can without its consent be compelled to litigate, and that in this case 'answering the question would be substantially equivalent to deciding the dispute between the parties.' On the merits of the *Eastern Carelia* question see Fortuin, *La question Carélienne* (1925); Kalijarvi in *A.J.*, xviii. (1924) pp. 93-97; and the literature cited above, p. 72, n. 1.

<sup>2</sup> *Off. J.*, Special Suppl. No. 177, p. 6; *Off. J.*, 1938, p. 988.

<sup>3</sup> See below, p. 130, n. 3.

<sup>4</sup> *Off. J.*, 1938, p. 878. Previously, in its Resolution of October 6, 1937 (*Off. J.*, Special Suppl. No. 169, p. 121), the Assembly merely assured China of its moral support and recommended that members of the League 'should refrain from taking any action which might have the effect of weakening China's power of resistance . . . and should also consider how far they can individually extend aid to China.' See also *Documents*, 1937, p. 701.

of Armaments (A Collection of Projects) (1921)—Schücking, *Garantiepak und Rüstungsbeschränkung* (1924)—Toynbee, *Survey of International Affairs, 1920-1923* (1925) and the following volumes—Butler, *Handbook to the League of Nations*, 2nd ed. (1925), pp. 82-95—Baker, *Disarmament* (1926) (for a presentation of the immediate problem)—Lavallaz, *Essai sur le désarmement et le Pacte de la Société des Nations* (1926)—Madariaga, *Disarmament* (1929)—*Handbuch des Abrüstungsproblems*, 3 vols., ed. by Niemeyer (1929)—Garde, *Le désarmement devant la Société des Nations* (1929)—Højjer, *La sécurité internationale et ses modes de réalisation*, vol. 4 (1930)—Ray, *Commentaire du Pacte* (1930), pp. 316-342—Headlam-Morley, *Studies in Diplomatic History* (1930), pp. 254-303—Greaves, *The League Committees and World Order* (1931), pp. 199-217—Lefebure, *Scientific Disarmament* (1931)—Fanshawe, *World Disarmament* (1931)—Wheeler-Bennett, *Disarmament and Security since Locarno, 1925-1931* (1932)—Myers, *World Disarmament; Its Problems and Prospects* (1932)—Hosono, *Histoire du désarmement* (1933)—Wheeler-Bennett, *The Disarmament Deadlock* (1934)—Chaput, *Disarmament in British Foreign Policy* (1935)—Mérignhac in *R.G.*, xxix. (1922) pp. 105-151—Hyde in *A.J.*, xx. (1926) pp. 237-256—Maurice in *International Affairs*, v. (1926) pp. 117-133—De Brouckère in *Hague Recueil*, 1928 (v.), pp. 365-450—Rolín Jaquemyns in *R.I.*, 3rd ser., x. (1929) pp. 2-31—Smith in *International Affairs*, x. (1931) pp. 600-613—*Round Table*, xxi. (1930-1931) pp. 717-737, and *ibid.*, xxiii. (1932-1933) pp. 1-19—Baker in *International Affairs*, xiii. (1934) pp. 3-25—Anon. in *R.I. (Paris)*, ix. (1932) pp. 6-54, 393-484, and x. (1932) pp. 6-51, 486-554. And see the references given below, p. 104, n. 4.

§ 25h. The problem of limitation of armaments is so closely Limitation of Armaments. interwoven with the measures and the machinery for the pacific solution of disputes that it is impossible to deny to it a place in a work of this character. By what is usually referred to as 'disarmament' is meant, not the abolition of armaments, but their reduction to limits reasonably commensurate with a State's national safety and the discharge of its international obligations. While there have been successful attempts to limit armaments by way of multilateral and bilateral treaties of a limited scope,<sup>1</sup> experience has shown that a reduction and limitation of armaments through general and comprehensive agreements is conditioned by the existence of effective international institutions entrusted with the ascertainment and enforcement of International Law.<sup>2</sup> The Covenant of the League.

<sup>1</sup> See below, p. 101.

<sup>2</sup> For the suggestion that disarmament without the simultaneous creation of an international govern-

ment may not be compatible with a system of International Law as a body of enforceable rules of conduct see Kelsen, *The Legal Process and International Order* (1935).

Without attempting any review <sup>1</sup> of past efforts to limit armaments, reference may be made to the fact that the limitation of armaments was the ostensible object of the First Peace Conference at The Hague in 1899, and to the unaccepted British proposal to Germany in 1907 for a 'naval holiday,' which was intended, by bringing about a mutual modification of naval programmes, to produce a *détente* in the relations between Great Britain and Germany.

At the end of the World War the intimate connection between armament policy and the outbreak of wars received definite international recognition in Article 8 of the Covenant of the League, and three principles are laid down therein as guidance for the mitigation of this source of danger. In the first place: 'The members of the League recognise that the maintenance of peace requires the reduction of national

<sup>1</sup> See Wehberg, *Die internationale Beschränkung der Rüstungen* (2nd ed., 1921), ch. iii<sup>b</sup>, an exhaustive and well-documented treatise on the whole subject. Among historical instances of international agreements for the limitation of armaments may be mentioned the following: (i) the treaty of August 30, 1787, between Great Britain and France, with particular reference to a limitation on the building of warships and the mutual communication of their equipment (see Wehberg, *op. cit.*, ch. iii<sup>b</sup>); (ii) the Rush-Bagot treaty of 1817 between Great Britain and the United States limiting the number, size, and equipment of warships on the Great Lakes (Wehberg, *loc. cit.*, and the Report of Foster, Secretary of State, before the Fifty-Second Congress, reprinted as a Carnegie Endowment Pamphlet, No. 2, 1914); (iii) a treaty between Bolivia and Peru of 1831 (Martens, *N.R.* 10 (1826-1832), p. 405); (iv) a treaty between Argentina and Chile of 1902 (see Manning, *Arbitration Treaties among the American Nations* (1924), p. 327 (n.)); (v) in February 1923 the Central American Republics signed a convention for the limitation of the strength of their armies for five years (see Hudson, *International Legislation*, ii. (1931) p. 942); (vi) in October 1930 Greece and Turkey signed a protocol con-

cerning naval armaments (accompanying the Pact of Friendship and Arbitration), in which they undertook not to increase their naval armaments 'without duly informing one another six months in advance so as to prevent, as between the two Governments, every possible competition in naval armaments.' In March 1931 a similar protocol was signed between Turkey and Soviet Russia (see, as to both, *Armaments Year-Book*, 1934, p. 942).

Cognate with the reduction of armaments as a means of preventing wars is the practice of instituting demilitarised zones—for instance, in some mandated territories (Article 22 of the Covenant), or in the islands of Mytilene, Chios, Samos, and Nikaria (Article 13 of the Treaty of Lausanne). See Baker, *Disarmament* (1926), pp. 293-301; Wheeler-Bennett, *Reduction of Armaments* (1925), pp. 152-157; Report to the Ninth Assembly of the League of Nations (1928) by the Committee on Arbitration and Security: Doc. A. 86(1). ix. 27; Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929), pp. 111-122; Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933), pp. 429-441; Rosenberg, *Entmilitarisierte Zonen* (1933); Erich in *Hague Recueil*, 1929 (i.), pp. 659-664; and see below, § 72 (n.).

armaments to the lowest point consistent with national safety,<sup>1</sup> and the enforcement by common action of international obligations.<sup>1</sup> The Council, taking into account the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments.'

Moreover, by Article 1 of the Covenant one of the conditions of the admission of a new member to the League is that it shall 'accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.'

The second principle relates to the danger of permitting the free play of commercial efforts to create a market and stimulate a demand for commodities so fraught with danger to civilisation as munitions and implements of war; and accordingly, 'The members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.'<sup>2</sup>

<sup>1</sup> See Weber, *Die Verteidigungspflicht der Gliedstaaten des Völkerbundes* (1932) (with special reference to the neutrality of Switzerland). As to the proposal, subsequently abandoned, of complete disarmament in Denmark in 1924, see Munch in *R.G.*, xxxiv. (1927) pp. 598-618; Castberg in *Acta Scandinavica*, i. (1930) pp. 1-18, 81-85; Möller, *ibid.*, pp. 19-24, 85-87; Wehberg, *ibid.*, ii. (1931) pp. 21-39, 45-48.

<sup>2</sup> See the Convention of June 17, 1925, for the Supervision of the International Trade in Arms, Munitions, and Implements of War, which, although it has been ratified by a considerable number of States, including Great Britain, France, and the United States, has not yet entered into force owing to the nature of the conditions and reservations attached to the acts of ratification. In this Convention the parties undertook, subject to some exceptions, not to export or permit the export of arms and munitions as specified in the Convention except to the Govern-

ments of States or governmental authorities in pursuance of properly signed and executed orders (Article 2). Special provisions were adopted for certain territorial and maritime zones in Africa and Asia. For the text of the Convention see Misc. No. 11 [1929] Cmd. 3448; Hudson, *International Legislation*, iii. p. 1634; League Doc. A. 6 (a). 1931. V. Annex. For the proceedings of the Conference see League Doc. A. 13. 1925. IX. For an analysis of the Convention and on the arms traffic generally see Barandon, pp. 384-390; Dupriez in *R.I.*, 3rd ser., vii. (1926) pp. 57-85; Carnegie in *International Affairs*, x. (1931) pp. 504-523; Pella in *R.G.*, xl. (1933) pp. 484-489; Rolin in *Problems of Peace*, viii. (1933) pp. 64-79; Drexel in *International Conciliation Pamphlet No. 295* (1933); Stimson in *Proceedings of the American Academy of Political Science*, xvi. (1935) pp. 12-38; Sandiford in *Rivista*, 14 (1935), pp. 139-158, 282-303. See also *Statistical Year-Book of the Trade in Arms, Ammunition and Implements of War*

The third principle relates to the danger of secrecy in the matter of armaments, because secrecy breeds fear, and, as Grotius has it, 'It is well said by Cicero that most injuries proceed from fear, he who meditates hurting another fearing that if he do not do so he will suffer some evil.'<sup>1</sup> Accordingly, 'The members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval, and air programmes, and the condition of such of their industries as are adaptable to warlike purposes.'<sup>2</sup>

Treaties  
for the  
Limita-  
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of Arma-  
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since  
1918.

§ 25i. It is convenient to give a summary account of the treaties for the limitation of armaments concluded since 1919:

(1) By the treaties of peace, Germany,<sup>3</sup> Austria, Hungary, and Bulgaria were subjected to drastic measures of compulsory disarmament. These provisions were subsequently terminated either by unilateral denunciation<sup>4</sup> or by agreement.<sup>5</sup>

(Annual Publication of the League since 1924).

<sup>1</sup> II. c. i. v. (Whewell's translation).

<sup>2</sup> In pursuance of that paragraph the Council of the League decided in July 1923 to publish an *Armaments Year-Book* giving general and statistical information, in regard to various States, whether members of the League or not, of their military forces, their budget expenditure on national defence, and their industries capable of being used for war purposes. The *Year-Book* has since been kept up to date. See Myers, *World Disarmament* (1932), pp. 197-212. On control over the export of war materials in Britain see Atwater in *A.J.*, xxxiii. (1939) pp. 292-317. And see the *Minutes of Evidence* taken before the Royal Commission on the Private Manufacture of and Trading in Arms (1935 and 1936) and Noel Baker, *The Private Manufacture of Armaments* (1936).

<sup>3</sup> Note the Preamble which precedes Article 159 of the Treaty of Versailles: 'In order to render possible the initiation of a general limitation of the armaments of all nations, Germany undertakes strictly to observe the military, naval, and air clauses which follow.' And see Baker, *Disarmament* (1926), pp. 106-124; Pavenstedt in *Yale Law Journal*,

xliv. (1935) pp. 1016-1020; and Temperly, *A History of the Peace Conference*, ii. (1920) pp. 302, 303, for the German statement and the Reply of the Allied and Associated Powers of June 16, 1919—both showing the connection between the disarmament clauses of the Treaty and the forthcoming measures of a general limitation of armaments.

<sup>4</sup> The crucial provisions of the Treaty of Versailles on the matter were unilaterally repudiated by Germany in March 1935, when she announced her intention to re-introduce conscription. One of the reasons advanced by Germany for her action was that the other signatories of the Treaty of Versailles had themselves violated the Treaty by failing to reduce their armaments in conformity with Article 159. The British Government had previously denied that the Preamble to that Article contained a legal obligation: see British Statement of Policy of September 18, 1932 (*Documents*, 1932, pp. 194-197). See Garner and V. Jobst iii. in *A.J.*, xxix. (1935) pp. 569-585; Fenwick, *ibid.*, pp. 675-678. For the German view see Hoetzsch in *International Affairs*, xi. (1932) pp. 40-51; Rühländ in *Z.V.*, xix. (1935) pp. 131-146.

<sup>5</sup> Thus, for instance, by an Agreement of July 1938 between the Balkan

(2) By a Treaty for the Limitation of Naval Armament<sup>1</sup> signed at Washington on February 6, 1922, by France, Great Britain, Italy, Japan, and the United States, and ratified by all the signatories (though in the case of France with reservations), they agreed to 'scrap' a number of warships, to limit their construction and acquisition of warships exceeding certain displacements, to limit the calibre of the guns to be carried by certain of their warships, and to communicate promptly to one another certain information regarding new warships laid down. The Treaty was to remain in force until the end of the year 1936, and thereafter until two years have elapsed from the date of a notice of termination. In December 1934 Japan formally denounced the Treaty.

(3) In the London Naval Treaty of April 22, 1930, the United States, Great Britain, Japan, France, and Italy agreed to further measures of limitation of naval armaments.<sup>2</sup> The principal limitations embodied in Part III. of the Treaty were agreed as between the three first-mentioned Powers.<sup>3</sup> They included a limitation of the tonnage and, in some cases, of numbers of certain types of cruisers, destroyers, and submarines. France and Italy did not ratify some of the substantial Parts of the Treaty, which ceased to be in force on January 1, 1937. Part IV., which was to remain in force without limit of time, contained a declaration concerning the use of submarines as destroyers of merchant-vessels. That Part was subsequently embodied in a separate Protocol signed in London on November 6, 1936.<sup>4</sup>

Entente (i.e. Greece, Roumania, Turkey, and Yugoslavia) and Bulgaria the latter was relieved of the obligations of the Treaty of Neuilly and the Lausanne Convention of 1923 regarding the frontiers of Thrace. Great Britain assented to that Agreement: Cmd. 5954 (1939).

<sup>1</sup> *L.N.T.S.*, xxv. p. 202; Cmd. 1627 of 1922; *A.J.*, xvi. (1922), Suppl., pp. 41-56; and see Treaty of Washington Act, 1922; Archimbaud, *La Conférence de Washington* (1923), pp. 259-289, 327-341; and Buell, *The Washington Conference* (1922), pp. 137-201; Shillock in *International Conciliation Pamphlets* (No. 245,

December 1928), pp. 573-578.

<sup>2</sup> For the text of the Treaty see: [1930] Cmd. 3758; *Documents*, 1930, p. 12. See also [1930] Cmd. 3485 and 3547. For an analysis and history of the Treaty see Toynbee, *Survey*, 1930, pp. 31-82; MacDonald in *International Affairs*, ix. (1930) pp. 429-451; *Round Table*, xx. (1929-1930) pp. 1-21. See also *Documents on the London Naval Conference* (published by H.M. Stationery Office, 1930).

<sup>3</sup> On the abortive Naval Conference of these three Powers in 1927 see Toynbee, *Survey*, 1927, pp. 43-82.

<sup>4</sup> See below, p. 384.

(4) By an exchange of notes of June 18, 1935, Germany agreed that the future strength of the German navy in relation to the aggregate naval strength of the members of the British Commonwealth of Nations should be in the proportion of 35:100. This limitation did not apply to submarines. Germany agreed to regard the arrangement as a 'permanent and definite' agreement.<sup>1</sup> She denounced it on April 28, 1939.

(5) On March 25, 1936, the United States, France, and Great Britain concluded another treaty<sup>2</sup> providing for limitations as to displacement and armament of the various categories of ships and<sup>3</sup> for advance notification and exchange of information regarding the annual programme for the construction and acquisition of all vessels of naval categories. The Treaty included a number of safeguarding clauses, for instance, for the case of war or of other material changes in circumstances.<sup>4</sup> On July 17, 1937, Great Britain signed separate agreements with Germany<sup>5</sup> and Russia<sup>6</sup> on lines closely following those of the Treaty with France and the United States. Italy adhered in December 1938.<sup>7</sup> In the same month Denmark, Finland, Norway, and Sweden, in treaties signed with Great Britain, adhered to the Treaty of 1936.<sup>8</sup> On the outbreak of the war with Germany in September 1939, Great Britain notified the Governments concerned that the obligations in respect of the Naval Agreements of 1936, 1937, and 1938 had been indefinitely suspended.<sup>9</sup>

The  
Disarma-  
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Con-  
ference.

§ 25j. Alongside of these treaties steps were taken by the

<sup>1</sup> Cmd. 4953 (1935); *Documents*, 1935, p. 142. See Freyberg-Eisenberg in *Z.ö.V.*, vi. (1936) pp. 1-21.

<sup>2</sup> Cmd. 5561 (1936); *Documents*, 1936, p. 616. See *The London Naval Conference, 1935* (Report of the Delegates of the United States, Government Printing Office, 1936).

<sup>3</sup> It was provided, for instance, that no capital ship shall exceed 35,000 tons standard displacement and that no capital ship shall carry a gun with a calibre exceeding 14 inches (Article 4). It was laid down that no submarine shall exceed 2000 tons or carry a gun exceeding 5.1 inches.

<sup>4</sup> Articles 24 and 26. By a protocol

signed on June 30, 1938, the United Kingdom, the United States, and France agreed that the figure of 35,000 tons in respect of Article 25 (3) should be changed to 45,000 tons. See *Off. J.*, 1938, p. 670.

<sup>5</sup> Cmd. 5519 (1937); *Documents*, 1936, p. 634.

<sup>6</sup> Cmd. 5518 (1937); *Documents*, 1936, p. 641. See Gladisch in *Z.ö.V.*, vi. (1936) pp. 455-478.

<sup>7</sup> *Off. J.*, 1939, p. 27.

<sup>8</sup> Cmd. 5999.

<sup>9</sup> At the same time the United States of America, France, and Italy informed Great Britain of their decision to suspend the Treaty.

League in pursuance of Articles 8 and 9 of the Covenant. It set up in 1920 a Permanent Advisory Armaments Committee, a body consisting of military, naval, and air experts.<sup>1</sup> The Assembly of that year decided to constitute a Temporary Mixed Commission of relatively independent membership which was requested to consider and draft plans for the limitation of armaments<sup>2</sup> and which was to a large extent responsible for the disarmament proposal of the Treaty of Mutual Assistance. In September 1925 the Sixth Assembly adopted a Resolution requesting the Council to make a preparatory study with a view to a Conference on the Reduction and Limitation of Armaments. In December 1925 the Council set up a Preparatory Committee for the Disarmament Conference composed of representatives of Governments.<sup>3</sup> At the end of 1930, after a number of set-backs and adjournments, that Committee produced, by a majority vote, a draft disarmament convention.<sup>4</sup> The Disarmament Conference met on February 5, 1932, at the time of the rapid progress of the invasion by Japan of the Chinese province of Manchuria and of actual hostilities between the Chinese and Japanese forces in the neighbourhood of Shanghai. It included the United States and Soviet Russia, and some other States which were not members of the League. A number of schemes were laid before the Conference. They included the French proposal for the creation of an international force possessing the exclusive use of specially aggressive weapons like bombing aircraft, heavy-range artillery, and submarines over a certain size; and the British plan for so-called qualitative disarmament based on

<sup>1</sup> For its constitution see *Off. J.*, June 1920, pp. 131-136. The Reports of that Committee will be found in the Minutes of the Meetings of the Council from 1920 to 1927.

<sup>2</sup> For its constitution see *Off. J.*, March-April 1921, pp. 143-149.

<sup>3</sup> For its constitution see *Off. J.*, February 1926, pp. 164-170. See also *ibid.*, October 1924, pp. 1379-1380, on the Constitution of the Committee of the Council for the Work of Disarmament.

As to the work of the Preparatory

Commission on the matter of Arbitration and Security see above, p. 79, n. 4.

<sup>4</sup> See League Doc. C. 4. M. 4. 1931. IX.; League Doc. C. 687. M. 288. 1930. IX.; Cmd. 3757 (including a Report of the Preparatory Disarmament Commission); *Documents*, 1931, pp. 18-39. For a detailed analysis of the Draft Convention see Myers, *World Disarmament* (1932). See also *ibid.*, p. 39, for the text of the resolution of the Twelfth Assembly of 1931 inviting the States members of the Conference to conclude an armaments truce.



the prohibition of specially aggressive weapons. No appreciable agreement on the true object of the Conference was forthcoming, and by July 1932 the principal result of the Conference was a resolution condemning chemical and bacteriological warfare.<sup>1</sup> By that time the political aspect of the Conference had become even more predominant as the result of the claim of Germany to equality in armaments notwithstanding the provisions of the Treaty of Versailles. This demand was conceded in principle in a declaration of a Conference of five Powers (France, Great Britain, Germany, Italy, and the United States) in the form of a concession of 'equality of rights in a system which would provide security for all nations.'<sup>2</sup> The advent of a new régime in Germany had, in the opinion of some Powers principally concerned, the effect of destroying the basis of that concession. In March 1933 another attempt to revive the Conference was made by the production of a detailed plan of limitation by Great Britain which was subsequently adopted as a basis of discussion.<sup>3</sup> In October 1933 Germany withdrew from the Conference and from the League of Nations in protest against what she construed as a denial of her claim to equality. Negotiations with Germany continued, and the General Committee of the Conference met in May 1934. These negotiations and meetings were conducted in the atmosphere of a general increase in the armaments of the principal Powers, including Germany, who in March 1935 officially and openly took steps amounting to a repudiation of the military clauses of the Treaty of Versailles. While the Conference was still in existence the world witnessed a return to competitive armaments exceeding those in the period immediately preceding the World War.<sup>4</sup>

<sup>1</sup> See below, § 113.

<sup>2</sup> *Documents*, 1932, p. 233.

<sup>3</sup> See League Doc. Conf. D/163; *Documents*, 1933, p. 151; Cmd. 4279.

<sup>4</sup> The Conference is not of direct interest to the international lawyer seeing that it did not produce any agreed and binding rules of law. But it is of some legal interest inasmuch as it constituted an attempt to secure such rules on a subject of paramount importance for the inter-

national society. Also, the views expressed in the course of the Conference by various Governments on a number of questions like gas warfare or aerial bombardment are of interest. These are the reasons which seem to justify the account given above of the work of the Conference. Its history demonstrated the intimate connection between the three postulates of international progress in the field of preservation of peace, namely,

arbitration, disarmament, security. But the basis of that unity was being removed at the very time when the Conference was opened, as the result of the failure to apply the provisions of the Covenant to the dispute between China and Japan which according to many constituted a test case of the legal and political efficacy of the system of collective security said to have been established by the Covenant.

For references on the history of the Conference see the literature quoted at the beginning of this section. Very full references to the reports of the meetings of the Permanent Advisory Armaments Commission, the Temporary Commission, and the Preparatory Commission for the Disarmament Conference will be found in a pamphlet issued in 1931 by the League of Nations Library and entitled 'Annotated Bibliography on Disarmament and Military Questions' (supplemented by the monthly lists of books and articles catalogued at the Library of the League).

For an admirable account of the various stages of the Conference and the preparatory work leading thereto see the successive issues of Toynbee's *Survey of International Affairs*. See also Rolin in *Problems of Peace*, vi. (1932) pp. 51-69; Madariaga, *ibid.*, ii. (1928) pp. 124-142, and v. (1931) pp. 284-303; and Arnold Forster, *ibid.*, vii. (1933) pp. 130-135, and viii. (1934) pp. 41-63. On the position at the end of 1934 see Wheeler-Bennett, *The Disarmament Deadlock* (1934).

On 'moral' disarmament and suggestions for international agreements and municipal legislation aiming at curtailing unscrupulous war propaganda see Pella in *Hague Recueil*, 1930 (iii.), pp. 794-815, and in particular in *R.G.*, xl. (1933) pp. 401-505; Rappaport in *Grotius Society*, xviii. (1933) pp. 41-64; De la Brière in *R.G.*, xl. (1933) pp. 129-139; Mirkiné - Guetézévitch, *Droit constitutionnel international* (1933), pp. 244-277, and in *Hague Recueil*, 1933 (iii.), pp. 673-773.

# CHAPTER II

## COMPULSIVE SETTLEMENT OF STATE DIFFERENCES

### I

#### ON COMPULSIVE MEANS OF SETTLEMENT OF STATE DIFFERENCES IN GENERAL

Hershey, Nos. 321-328—Lawrence, § 136—Westlake, ii. p. 6—Phillimore, iii. § 7—Pradier-Fodéré, vi. No. 2632—Despagnet, No. 483—Mérignhac, iii<sup>e</sup>. p. 44—Fiore, ii. No. 1225, and *Code*, Nos. 1386-1390—Taylor, § 4313—Nys, ii. pp. 581-593—Hyde, ii. § 586—Fauchille, § 971—Rolin, §§ 93-100—Fenwick, pp. 420-427—Stowell, pp. 463-465, 487-489—Schoenborn, *Die Besetzung von Vera Cruz* (1914), pp. 7-35—Keller, *Die nichtkriegerische militärische Gewaltmassnahme* (1934).

Concep-  
tion and  
Kinds of  
Compul-  
sive  
Means of  
Settle-  
ment.

§ 26. Compulsive means of settlement of differences are measures containing a certain amount of compulsion taken by a State for the purpose of making another State consent to such settlement of a difference as is required by the former. There are four different kinds of such means in use—namely, retorsion, reprisals (including embargo), pacific blockade, and intervention.

Compul-  
sive  
Means in  
contradis-  
tinction  
to War.

§ 27. War is very often enumerated among the compulsive means of settling international differences. This is in a sense correct, but the characteristics of compulsive means of settling international differences make it necessary to draw a sharp line between them and war. It is, in the first place, characteristic of compulsive means that, although they frequently consist of harmful measures, they are not considered as acts of war, either by the conflicting States<sup>1</sup> or by other States, and consequently all relations of peace, such as diplomatic and commercial intercourse, the exe-

<sup>1</sup> Subject, however, to the option which the State against whom such compulsive measures are employed

has to treat them as constituting war; see below, § 55.

cution of treaties, and the like, remain undisturbed. Compulsive means are in theory and practice considered peaceable, although not amicable, means of settling international differences. It is, further, characteristic of compulsive means that they are even at their worst confined to the application of certain harmful measures only, whereas belligerents in war may apply any amount and any kind of force, with the exception only of those methods forbidden by International Law. Thirdly, it is characteristic of compulsive means that a State which has succeeded in compelling another to declare that it is ready to settle the difference in the manner desired must cease to apply them; whereas, war once broken out, a belligerent is not obliged to lay down arms if and when the other belligerent is ready to comply with the request made before the war. As war is the *ultima ratio* between States, the victorious belligerent is not legally prevented from imposing upon the defeated foe any conditions he likes.

§ 28. Since these are the characteristics of compulsive means for the settlement of international differences, it is necessary to distinguish between such means and an *ultimatum*. The latter is the technical term for a written communication by one State to another which ends amicable negotiations respecting a difference, and formulates, for the last time and categorically, the demands to be fulfilled if other measures are to be averted. An *ultimatum* is, theoretically at least, not compulsion, although it may have the same effect, and although compulsive means, or even war, may (subject to the obligations of the Covenant and of the General Treaty for the Renunciation of War <sup>1</sup>) be threatened in the event of a refusal to comply with the demands made.<sup>2</sup> Similarly, withdrawal of diplomatic agents, military and naval demonstrations, and the like, which some writers <sup>3</sup>

Compulsive Means in contradistinction to an Ultimatum and Demonstrations.

(7)

<sup>1</sup> See below, p. 152, end of n. 6.

<sup>2</sup> See Pradier-Fodéré, vi. No. 2649; Braun, *Demarche, Ultimatum, Somation* (1929); Asbeck, *Das Ultimatum im modernen Völkerrecht* (1933); and below, § 95.

<sup>3</sup> See Taylor, §§ 431, 433, 441; Moore, vii. §§ 1089, 1091, 1099; Pradier-Fodéré, vi. No. 2633. Hyde,

ii. §§ 587 and 595, includes within 'Non-Amicable Modes short of War' withdrawal of diplomatic relations and suspension of commercial intercourse. And see the Report, approved by the Council of the League in 1927, on the measures to be taken under Article 11: League Doc. A. 14. 1927. V., p. 76.

enumerate among the compulsive means of settlement of international differences, although they may indirectly achieve the settlement of differences, are not in themselves measures of compulsion.

## II

### RETORSION

Vattel, ii. § 341—Hall, § 120—Westlake, ii. p. 6—Phillimore, iii. § 7—Twiss, ii. § 10—Taylor, § 435—Wharton, iii. § 318—Moore, vii. § 1090—Wheaton, § 290—Bluntschli, § 505—Heffter, § 110—Bulmerincq in *Holtzendorff*, iv. pp. 59-71—Ullmann, § 159—Fauchille, §§ 972-974 (1)—Despagnet, Nos. 484-486—Mérignhac, iii<sup>a</sup>. p. 46—Pradier-Fodéré, vi. Nos. 2634-2636—Rivier, ii. § 60—Nys, ii. p. 582—Calvo, iii. § 1807—Fiore, ii. Nos. 1226-1227, and *Code*, Nos. 1391-1395—Martens, ii. § 105—Suarez, § 334—Rolin, §§ 101-104—Hyde, ii. § 588—Stowell, pp. 465-468—Bardeleben, *Die zwangsweise Durchsetzung im Völkerrecht* (1930), pp. 10-13—Rapisardi-Mirabelli in *R.I.*, 2nd ser., xvi. (1914) pp. 223-244, and *La ritorsione* (1919).

Concep-  
tion and  
Character  
of Retor-  
sion.

§ 29. Retorsion is the technical term for retaliation for discourteous, or unkind, or unfair and inequitable acts by acts of the same or a similar kind. The act which calls for retaliation is not an illegal act; on the contrary, it is an act that is within the competence of the doer.<sup>1</sup> But a State can commit many legislative, administrative, or judicial acts which, although they are not internationally illegal, involve discourtesy or unfriendliness to another State, or are unfair and inequitable. If the State against which such acts are directed considers itself wronged thereby, a political difference is created which might be settled by retorsion.

Retor-  
sion,  
when  
justified.

§ 30. The question when retorsion is, and when it is not, justified is not one of law, and is difficult to answer. The difficulty arises from the fact that the conceptions of discourtesy, unfriendliness, and unfairness cannot be defined very precisely. It depends, therefore, largely upon the circumstances and conditions of each case, whether a State will or will not consider itself justified in making use of retorsion. In practice, States have frequently employed retorsion in cases of unfair treatment of their citizens abroad

<sup>1</sup> Many writers use the term 'retorsion' to cover action taken to redress legal wrongs, e.g. Westlake, ii. p. 6,

followed by Hyde, ii. § 588. But see Hall, § 120.

through rigorous passport regulations, the exclusion of foreigners from certain professions, the levy of exorbitant protectionist or fiscal duties; or in cases when the courts of another State have refused the usual assistance to its courts, or another State has refused to admit foreign ships to its harbours, etc.<sup>1</sup>

§ 31. The essence of retorsion consists in retaliation for a noxious act by a noxious act. But a State, in making use of retorsion, is by no means confined to acts of the same kind as those complained of, acts of a similar kind being equally admissible, provided they are not internationally illegal. And, further, as retorsion is made use of only to compel a State to alter its discourteous, unfriendly, or unfair behaviour, all acts of retorsion ought at once to cease when it does so.

§ 32. The value of retorsion as a means of settling certain international differences consists in its compulsive force, which has great power in regulating the intercourse of States. It is a commonplace of human nature, and by experience constantly confirmed, that evildoers are checked by retaliation, and that those who are inclined to commit a wrong against others are often prevented by the fear of it. Through the high tide of chauvinism, protectionism,<sup>2</sup> and unfriendly feelings against foreign nations, States are often tempted to legislative, administrative, and judicial acts against other States which, although not internationally illegal, nevertheless endanger friendly relations and normal intercourse. The certainty of retaliation may be the only force which can make States resist the temptation.

### III

#### REPRISALS

Grotius, iii. c. 2—Vattel, ii. §§ 342-354—Bynkershoek, *Quaestiones Juris publici*, i. c. 24—Hall, § 120—Lawrence, §§ 136-137—Westlake, ii. pp. 6-11, and *Papers*, pp. 590-606—Holland, *Lectures*, pp. 229-238—Keith's *Wheaton*,

<sup>1</sup> For a case of exclusion of shipping see *The Frances and Eliza* (1823) 8 Wheat. 398, Scott, *Cases*, p. 500.

<sup>2</sup> See the article by Bailey on 'The

Political Aspect of Discrimination in International Economic Relations' in *Economica*, February and May 1932.

pp. 623-627—Twiss, ii. §§ 11-22—Moore, vii. §§ 1095, 1096, 1098—Taylor, §§ 436-437—Wharton, iii. §§ 318, 320—Wheaton, §§ 291-293—Bluntschli, §§ 500-504—Heffter, §§ 111-112—Bulmerincq in *Holtzendorff*, iv. pp. 72-116—Ullmann, § 160—Fauchille, §§ 975-985—Despagnet, Nos. 487-495—Pradier-Fodéré, vi. Nos. 2637-2647—Mérignhac, iii<sup>a</sup>. pp. 48-60—Rivier, ii. § 160—Nys, ii. pp. 582-589—Calvo, iii. §§ 1808-1831—Fiore, ii. Nos. 1228-1230, and *Code*, Nos. 1396-1404—Martens, ii. § 105—Suarez, § 335—Strupp in *Strupp*, *Wört.*, ii. pp. 349-354, and in *Das völkerrechtliche Delikt*, pp. 180-208—Hatschek, pp. 404-409—De Louter, ii. pp. 198-205—Rolin, §§ 105-127—Hyde, ii. §§ 589-591, 593, 594—Lafargue, *Les représailles en temps de paix* (1899)—Ducrocq, *Représailles en temps de paix* (1901), pp. 5-57, 175-232—Butler and Maccoby, *The Development of International Law* (1928), pp. 172-182—Bardleben, *Die zwangsweise Durchsetzung im Völkerrecht* (1930), pp. 13-23—Stowell, *International Law* (1931), pp. 468-484—Hindmarsh, *Force in Peace* (1933), pp. 43-56, 75-81—Haumant, *Les représailles* (1934)—Keller, *Die nichtkriegerische militärische Gewaltmassnahme* (1934)—Widmer, *Der Zwang im Völkerrecht* (1936), pp. 30-54, 133-141—Kappus, *Der völkerrechtliche Kriegsbegriff in seiner Abgrenzung gegenüber den militärischen Repressalien* (1937)—De la Brière in *Hague Recueil*, 1928 (ii.), pp. 241-293—Cavaglieri, *ibid.*, 1929 (i.), pp. 574-580—Verdross, *ibid.*, 1929 (v.), pp. 491-493—Cavaglieri in *Rivista di diritto internazionale*, 2nd ser., iv. (1915) pp. 23-49 and 305-402—Maccoby in *Cambridge Law Journal*, 1924, pp. 60-73—Kelsen in *Z.ö.R.*, xii. (1932) pp. 571-578—Politis in *Annuaire*, xxxviii. (1934) pp. 1-88—*Ibid.*, pp. 89-166, 623-694—Baty in *A.J.*, xxx. (1936) pp. 381-398—Schoen in *Z.V.*, xx. (1936) pp. 14-64—Sfériades in *R.I.*, 3rd ser., xvii. (1936) pp. 139-164.

Concep-  
tion of  
Reprisals  
in contra-  
distinction  
to Retor-  
sion.

§ 33. Reprisals are such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency. Whereas retorsion consists in retaliation for discourteous, unfriendly, unfair, and inequitable acts by acts of the same or a similar kind, and has nothing to do with international delinquencies, reprisals are acts, otherwise illegal, performed by a State for the purpose of obtaining justice for an international delinquency by taking the law into its own hands. It is, of course, possible for a State to retaliate for an illegal act committed against itself by an act of a similar kind. Such retaliation would be retorsion in the ordinary sense of the term; but not in the technical meaning of the term, as used by those writers on International Law who correctly distinguish between retorsion and reprisals.

Reprisals  
admis-  
sible for  
all Inter-  
national  
Delin-  
quencies.

§ 34. Reprisals are admissible, not only, as some writers <sup>1</sup>

<sup>1</sup> See, for instance, Twiss, ii. § 19.

maintain, in case of denial or delay of justice, or other ill-treatment of foreign citizens prohibited by International Law, but in all other cases of an international delinquency for which the injured State cannot get reparation through negotiation,<sup>1</sup> or other amicable means, be it non-compliance with treaty obligations, violation of the dignity of a foreign State, violation of foreign territorial supremacy, or any other internationally illegal act.<sup>2</sup>

Thus, to give an example, Great Britain, in the case of the Sicilian Sulphur Monopoly, performed acts of reprisal against the Two Sicilies in 1840 for a violation of a treaty. By the Treaty of Commerce of 1816 between the Two Sicilies and Great Britain certain commercial advantages had been secured to Great Britain; and when, in 1838, the Neapolitan Government granted a sulphur monopoly to a company of French and other foreign merchants, Great Britain protested against this as a violation of her treaty rights, and demanded the revocation of the monopoly. The Neapolitan Government declined to comply, and Great Britain in 1840 laid an *embargo* on Sicilian ships in the harbour of Malta, and ordered her fleet in the Mediterranean to seize Sicilian ships, by way of reprisal. A number of vessels were captured, but were restored after the Sicilies had, through the mediation<sup>3</sup> of France, agreed to withdraw the grant of the sulphur monopoly.

§ 35. Reprisals are admissible solely and exclusively in the case of international delinquencies. ] As internationally injurious acts on the part of administrative and judicial officials, armed forces, and private individuals are not *ipso facto* international delinquencies, no reprisals for them are admissible if their State discharges the obligations of its

Reprisals  
admissible for  
International  
Delinquencies  
only.

<sup>1</sup> As regards reprisals for the non-payment of contract debts see below, § 41.

<sup>2</sup> As to the legality of reprisals as between members of the League of Nations see below, § 52a.

<sup>3</sup> See Satow, *Diplomatic Practice*, ii. § 636. Again, when in 1908 de Castro, the President of Venezuela, dismissed M. de Reuss, the Dutch

minister resident at Caracas, Holland considered this step to be a violation of her dignity, and sent cruisers into Venezuelan waters to take reprisals. These cruisers captured the Venezuelan coastguard ship *Alexis* outside Puerto Cabello, and another Venezuelan public vessel; but both were restored in 1909, when de Castro was deposed, and the new President negotiated a settlement with Holland.



vicarious responsibility.<sup>1</sup> However, should it refuse to do so, its vicarious responsibility would turn into original responsibility, and thereby an international delinquency would be created, for which reprisals are indeed admissible.

The reprisals ordered by Great Britain in the case of Don Pacifico are an illustrative example of unjustified reprisals, because no international delinquency had been committed. In 1847 a riotous mob, aided by Greek soldiers and gendarmes, broke into, and plundered, the house of Don Pacifico, a native of Gibraltar, and an English subject living at Athens. Great Britain claimed damages from Greece, although Don Pacifico had not sought redress in the Greek courts. Greece refused to comply with the British claim, maintaining correctly that Don Pacifico ought to institute an action for damages against the rioters before the Greek courts. Great Britain continued to press her claim, and finally in 1850 blockaded the Greek coast and ordered, by way of reprisal, the capture of Greek vessels. The conflict was eventually settled by Greece paying £150 to Don Pacifico. It is generally recognised that Great Britain had no right to act as she did in this case.<sup>2</sup> She should have claimed damages directly from the Greek Government only after the Greek courts had denied satisfaction to Don Pacifico.<sup>3</sup>

Reprisals,  
by whom  
per-  
formed.

§ 36. Acts of reprisal may nowadays be performed only by State organs such as armed forces, or men-of-war, or administrative officials, in compliance with a special order of their State. But in former times private individuals used to perform them. Such private acts of reprisal seem to have been in vogue in antiquity, for there existed a law in Athens according to which the relatives of an Athenian, murdered in a foreign State which refused punishment or extradition of the murderer, had the right to seize, and

<sup>1</sup> See above, vol. i. §§ 149, 150.

<sup>2</sup> See a criticism of this statement by Hogan, *Pacific Blockade*, p. 113, where it is pointed out that the sum of £150 merely related to a portion of Don Pacifico's claims, and further that the claims of other British subjects were also involved in the reprisals.

<sup>3</sup> See above, vol. i. § 167. The case is reported with all its details in

Martens, *Causes célèbres*, v. pp. 395-531. For an instance of reprisals against a State whose Government is not recognised see the case of the shelling of Almeria on May 31, 1937, by German ships as a measure of reprisals for the bombing of the German cruiser *Deutschland* on May 29. See Böhmert in *Z.V.*, xxi. (1937) pp. 297-307.

bring before the Athenian courts, three citizens of that State (so called *ἀνδροληψία*). During the Middle Ages, and even in modern times to the end of the eighteenth century, States used to grant so-called 'letters of marque' to subjects who had been injured abroad, either by a foreign State itself or by its citizens, and could not get redress.<sup>1</sup> These documents authorised the bearer to commit acts of self-help against the State concerned, its citizens and their property, for the purpose of obtaining satisfaction for the wrong sustained. In later times, however, States themselves also performed acts of reprisal. In consequence, their performance by private individuals fell more and more into disuse, and finally disappeared totally with the end of the eighteenth century. The distinction between general and special reprisals, which used formerly to be drawn, is based on the fact that in former times a State could either authorise a single private individual to perform an act of reprisal (*special* reprisals), or command its armed forces to perform all kinds of such acts (*general* reprisals). The term 'general reprisals' is used nowadays by Great Britain for the authorisation of the British Fleet to seize in time of war all enemy ships and goods.<sup>2</sup>

§ 37. An act of reprisal may be performed against any-thing and everything that belongs to, or is due to, the delinquent State or its citizens. Ships sailing under its flag may be seized, treaties concluded with it may be suspended, a part of its territory may be militarily occupied,<sup>3</sup> goods belonging to it, or to its citizens, may be seized, and the like. Thus in 1895 Great Britain ordered a fleet to land forces at Corinto, and to occupy the custom-house and other govern-

Objects of  
Reprisals.

<sup>1</sup> On the early English practice see Clark in *A.J.*, xxvi. (1933) pp. 694-723.

<sup>2</sup> Phillimore (iii. § 10) cites the following Order in Council of March 29, 1854: 'Her Majesty having determined to afford active assistance to her ally, His Highness the Sultan of the Ottoman Empire, for the protection of his dominions against the encroachments and unprovoked aggression of His Imperial Majesty the Emperor of All the Russias, Her

Majesty is therefore pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, that general reprisals be granted against the ships, vessels, and goods of the Emperor of All the Russias, and of his subjects, or others inhabiting within any of his countries, territories, or dominions, so that Her Majesty's fleets may lawfully seize all ships, vessels, and goods,' etc.

<sup>3</sup> See Llewellyn Jones in *Grotius Society*, ix. (1924) pp. 149-163.

ment buildings, as an act of reprisal against Nicaragua ; again, in 1901 France ordered a fleet to seize the island of Mytilene, as an act of reprisal against Turkey ; and in 1908 Holland ordered a squadron to seize two public Venezuelan vessels as an act of reprisal against Venezuela.<sup>1</sup> The persons of officials, and even of private citizens, of the delinquent State are possible objects of reprisals. Thus, when in 1740 the Empress Anne of Russia arrested without just cause Baron de Stackelberg, a natural-born Russian subject, who had, however, become naturalised in Prussia by entering Prussian service, Frederick II. of Prussia seized two Russian subjects by way of reprisal, and detained them until Stackelberg was liberated. But it must be emphasised that the only act of reprisal admissible against foreign officials or citizens is arrest ; they must be treated, not like criminals, but like hostages, and under no circumstance may they be executed, or subjected to punishment.

The rule that anything and everything belonging to the delinquent State may be made the object of reprisals has, however, exceptions ; for instance, individuals enjoying the privilege of extritoriality while abroad, such as heads of States and diplomatic envoys, may not<sup>2</sup> be made the object of reprisals, although this has occasionally been done in practice.<sup>3</sup> In regard to another exception—namely, public debts—unanimity does not exist, either in theory or in practice. When Frederick II. of Prussia in 1752, by way of negative reprisals for an alleged injustice of British Prize Courts against Prussian subjects, sequestered the payments of the Silesian loan due to English creditors, Great Britain, in addition to denying that there was a just cause for reprisals at all, maintained that public debts may not be made the object of reprisals. English jurists and others, as for instance Vattel, agree, but German writers dissent.<sup>4</sup>

<sup>1</sup> See above, § 34 (n.).

<sup>2</sup> Grotius, ii. c. 18, § 7.

<sup>3</sup> See the case reported in Martens, *Causes célèbres*, i. p. 35.

<sup>4</sup> See Vattel, ii. § 344 ; Phillimore, iii. § 22, in contradistinction to Heffter, § 111, n. 5. The case is treated in all its details in Satow,

*The Silesian Loan and Frederick the Great* (1915). See also Martens, *Causes célèbres*, ii. pp. 97-168, and Trendelenburg, *Friedrichs des Grossen Verdienst um das Völkerrecht im Seekrieg* (Monthly Report of the Prussian Academy of Sciences, January 1866). And see Jessup and Deák

§ 38. Reprisals can be positive or negative. Positive reprisals are such acts as would under ordinary circumstances involve an international delinquency. Negative reprisals consist in a refusal to perform such acts as are under ordinary circumstances obligatory, such as the fulfilment of a treaty obligation or the payment of a debt.

Positive  
and  
Negative  
Reprisals.

§ 39. Reprisals, be they positive or negative, must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation.<sup>1</sup> For instance, a State would not be justified in arresting, by way of reprisal, thousands of foreign subjects living on its territory because their home State had denied justice to one of its subjects living abroad. But it would be justified in ordering its own courts to deny justice to all subjects of that foreign State, or in ordering its fleet to seize several vessels sailing under the flag of that State, or in suspending a commercial treaty with it.

Reprisals  
must be  
proportionate.

§ 40. A kind of reprisal which is called embargo must be specially mentioned. This term of Spanish origin<sup>2</sup> means detention, but in International Law it has the technical meaning of detention of ships in port. Now, as by way of reprisal all acts, otherwise illegal, may be performed, there is no doubt that ships of the delinquent State may be prevented from leaving the ports of the injured State, for the purpose of compelling the delinquent State to make reparation for the wrong done.<sup>3</sup>

Embargo.

in *Political Science Quarterly*, xlviii. (1933) pp. 353-357. The dispute was settled in 1756—see below, § 437—through Great Britain paying an indemnity of £20,000.

<sup>1</sup> This rule was expressly affirmed in the *Navililaa* case between Portugal and Germany, decided in 1928 by a special arbitral tribunal: *Annual Digest*, 1927-1928, Case No. 360. The tribunal held that the reprisals resorted to in that case by Germany were illegal, as there was an obvious lack of proportion between the shooting of some German soldiers in the course of a frontier incident and the extensive invasion of Portuguese territory. See, however, Strupp in *Strupp, Wört.*, ii. p. 350, and Hatschek,

p. 405, who are both of the opinion that it is impossible to show that 'proportionality' is a positive rule of International Law.

<sup>2</sup> From Spanish *embargar*, Late Latin *imbaricare* (*barra*=bar) (Concise Oxford Dictionary). On *embargo* see Hyde, ii. §§ 593-594.

<sup>3</sup> Thus in 1840—see above, § 34—Great Britain laid an *embargo* on Sicilian ships. It is often not easy to say whether the detention of ships is done as a reprisal for the purpose of compelling reparation, or as an anticipatory measure designed to facilitate the capture and confiscation of the enemy's merchant-ships in the event of war breaking out. *The Boedes Lust* (1804) 5 C. Rob. 233

But the important point is to distinguish *embargo* by way of reprisal from detention of ships for other reasons. (i) It was formerly the practice, when war seemed imminent, for each conflicting State to lay an *embargo* upon the merchantships of the other in its ports, by way of anticipation and with a view to facilitating capture and condemnation in the event of war breaking out; but this practice is believed to be obsolete, even when the conflicting States are not parties to Hague Convention VI.<sup>1</sup> (ii) Another kind of *embargo* is the so-called *arrêt de prince*<sup>2</sup>—that is, a detention of foreign ships to prevent the spread of news of political importance. And (iii) there is *embargo* arising out of the so-called *jus angariae*—that is, the right of a belligerent State to seize, and make use of, neutral property in case of necessity, under the obligation to compensate the neutral owner.<sup>3</sup>

These kinds of international *embargo* must not be confounded with the so-called *civil embargo* of English Municipal Law<sup>4</sup>—namely, an order of the sovereign to English ships not to leave English ports.<sup>5</sup>

Reprisals to be preceded by Negotiations and to be stopped when Reparation is made.

§ 41. Like all other compulsive means of settling international differences, reprisals are admissible only after negotiations have been conducted in vain for the purpose of obtaining reparation from the delinquent State.<sup>6</sup> In former times, when States used to authorise private indi-

seems to be an equivocal case; if war had not followed, it would have been looked upon as a successful reprisal; but, as war did follow, it was retroactively treated as a hostile measure *ab initio*.

<sup>1</sup> See below, § 102*a*, where the attitude of belligerents at the outbreak of the World War, and the position existing where Hague Convention VI. does not apply, are discussed.

<sup>2</sup> See Steck, *Versuch über Handels- und Schifffahrts-Verträge* (1782), p. 355; Caumont, *Dictionnaire universel de droit maritime* (1867), pp. 247-265; Calvo, iii. § 1277; Pradier-Fodéré, v. p. 719; Holtzendorff, iv. pp. 98-104.

<sup>3</sup> See below, §§ 364-367.

<sup>4</sup> See Phillimore, iii. § 26; *The William King* (1817) 2 Wheat. 148, Scott, *Cases*, p. 493, seems to be an American illustration of civil *embargo*.

<sup>5</sup> For reasons of national safety, as in the case of ships laden with coal on the occurrence of the stoppage of the coal mines in 1921 or 1926, see *France Fenwick & Co. v. Rex* [1927] 1 K.B. 458, and Holdsworth in *Law Quarterly Review*, xxxv. (1919) pp. 12-42. For an interpretation of the term 'embargo' in the Treaty of 1783 between Sweden and the United States see the case of *The Kronprinz Gustaf Adolf and The Pacific* decided in July 1932: *A.J.*, xxvi. (1932) pp. 834-903.

<sup>6</sup> See the *Naulilaa* case between Portugal and Germany, decided in 1928 by a special arbitral tribunal, where it was held that reprisals are illegal if they are not preceded by a request to remedy the alleged injury: *Annual Digest*, 1927-1928, Case No. 360.

viduals to perform special reprisals, treaties of commerce and peace frequently stipulated for a certain period of time, for instance three or four months, to elapse after an application for redress before the grant of letters of marque by the injured State.<sup>1</sup> Although with the disappearance of special reprisals this is now antiquated, a reasonable time for the performance of reparation must even nowadays be given. On the other hand, reprisals must at once cease when the delinquent State makes the necessary reparation. Individuals arrested must be set free, goods and ships seized must be handed back, occupied territory must be evacuated, suspended treaties must again be put into force, and the like.<sup>2</sup>

§ 42. Reprisals in time of peace must not be confounded with reprisals between belligerents. Whereas the former are resorted to for the purpose of settling a conflict without going to war, the latter<sup>3</sup> are retaliations in order to compel an enemy guilty of a certain illegal act of warfare to comply with the laws of war.

Reprisals during Peace in contradistinction to Reprisals during War.

§ 43. Before the acceptance of the obligations of the Covenant of the League, States were entitled to have recourse to reprisals for such international delinquencies as they thought not important enough for a declaration of war, but too important to be entirely overlooked. That reprisals were a rough means for the settlement of differences, and that the institution of reprisals would give, and had in the past given, occasion for abuse in case of a difference between a powerful and a weak State, could not be denied. On the other hand, in the absence of a central authority above the sovereign States which could compel a delinquent State to make reparation, the institution of reprisals could scarcely be abolished. How far, if at all, the institution of reprisals and other modes of compulsive

Value of Reprisals.

<sup>1</sup> See Phillimore, iii. § 14.

<sup>2</sup> In the case of recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals, reprisals by means of armed forces can, according to Article 1 of Convention II., only be

resorted to in case the debtor State refuses arbitration, or, having accepted it, declines to give effect to an award. For a discussion of this Hague Convention see vol. i. § 135; and see Fischer Williams in *Hague Recueil*, 1923 (i.), pp. 328-339.

<sup>3</sup> See below, § 247.

settlement of disputes have been affected by the Covenant of the League and by the General Treaty for the Renunciation of War is discussed below.<sup>1</sup> There appears to be room for the view that so long as the renunciation of the right of war is not accompanied by an obligation to submit disputes to obligatory judicial settlement, and so long as there is no agency enforcing compliance with that obligation and with the judicial decision given in pursuance thereof, reprisals, at least of a non-forcible character, must be recognised as a means of enforcing International Law.<sup>2</sup>

## IV

## PACIFIC BLOCKADE

Hall, § 121—Lawrence, § 138—Westlake, ii. pp. 11-18, and *Papers*, pp. 572-589—Taylor, § 444—Moore, vii. § 1097—Bluntschli, §§ 506-507—Heffter, § 112—Bulmerincq in *Holtzendorff*, iv. pp. 116-127—Ullmann, § 162—Fauchille, §§ 986-994 (1)—Despagnet, Nos. 496-498—Mérignhac, iii<sup>e</sup>. pp. 60-64—Pradier-Fodéré, v. Nos. 2483-2489, vi. No. 2648—Rivier, ii. § 60—Nys, ii. pp. 590-593—Calvo, iii. §§ 1832-1859—Fiore, ii. No. 1231, and *Code*, Nos. 1409-1419—Martens, ii. 105—Holland, *Studies*, pp. 130-150—Suarez, §§ 338, 338 *bis*—De Louter, ii. pp. 207-211—Rolin, §§ 128-135—Hyde, ii. § 592—Baty, pp. 112-119—Keith's Wheaton, pp. 627-630—Deane, *The Law of Blockade* (1870), pp. 45-48—Fauchille, *Du blocus maritime* (1882), pp. 37-67—Falcke, *Die Hauptperioden der sogenannten Friedensblockaden* (1891), and in *Z.I.*, xix. (1909) pp. 63-175—Barès, *Le blocus pacifique* (1898)—Ducrocq, *Représailles en temps de Paix* (1901), pp. 59-174—Hogan, *Pacific Blockade* (1908)—Söderquist, *Le blocus maritime* (1908)—Staudacher, *Die Friedensblockade* (1909)—Falcke, *Le blocus pacifique* (1919), and in *Z.I.*, xxviii. (1919-1920) pp. 36-182—Hiller, *Die Friedensblockade* (1923)—von Martitz in *Z.V.*, xi. (1918-1920) pp. 610-621—League Doc. A. 14. 1927. V. (Reports and Resolutions, on the Subject of Article 16), pp. 89-93—Campailla in *Diritto Marittimo*, 38 (1936), pp. 81-89—Parry in *Z.ö.V.*, viii. (1938) pp. 672-688.

<sup>1</sup> See below, §§ 52a-52d and § 52l.

<sup>2</sup> The Institute of International Law at its Paris session in 1934 considered a report by Politis, and adopted a Resolution concerning the use of reprisals in time of peace. According to the Resolution, reprisals involving armed force are prohibited with the exception of action taken in self-defence or in pursuance of properly authorised international action. Moreover, according to the Resolution,

even non-armed reprisals are prohibited when compliance with the law can be assured by means of pacific settlement. See *R.I.*, 3rd ser., xv. (1934) pp. 744-746. See also Strupp in *Hague Recueil*, 47 (1934) (i.), pp. 568-572; *Annuaire*, xxxviii. (1934) pp. 708-711; and see *ibid.*, pp. 623-694, for an instructive discussion; Schoen in *Z.V.*, xx. (1936) pp. 51-64; Séfériades in *R.I.*, 3rd ser., xvii. (1936) pp. 139-164.

§ 44. Before the nineteenth century, blockade was only known as a measure between belligerents in time of war. It was not until the second quarter of the nineteenth century that a so-called pacific blockade—that is, a blockade during time of peace—was first resorted to as a compulsive means of settling an international difference. All cases of pacific blockade are cases either of intervention or of reprisals.<sup>1</sup> The first case, one of intervention, happened in 1827, when, during the Greek insurrection, Great Britain, France, and Russia intervened in the interest of the independence of Greece, and blockaded those parts of the Greek coast which were occupied by Turkish troops. Although this blockade led to the battle of Navarino, in which the Turkish fleet was destroyed, the Powers maintained, nevertheless, that they were not at war with Turkey.<sup>2</sup> In 1831, France blockaded the Tagus as an act of reprisal for the purpose of exacting redress from Portugal for injuries sustained by French subjects. Great Britain and France, exercising intervention for the purpose of making Holland consent to the independence of revolting Belgium, blockaded the coast of Holland in 1833. In 1838, France blockaded the ports of Mexico as an act of reprisal, but Mexico replied with a declaration of war. Likewise as an act of reprisal, and in the same year, France blockaded the ports of Argentina; and in 1845, conjointly with Great Britain, France blockaded the ports of Argentina a second time. In 1850, in the course of her differences with Greece relative to Don Pacifico,<sup>3</sup> Great Britain blockaded the Greek ports, but against Greek

Develop-  
ment of  
Practice  
of Pacific  
Blockade.

<sup>1</sup> A blockade instituted by a State against portions of its own territory in revolt is not a blockade for the purpose of settling international differences. It has, therefore, in itself nothing to do with the Law of Nations, but is a matter of internal police. The author, therefore, could not agree with Holland, who, in his *Studies in International Law*, p. 138, treats it as a pacific blockade *sensu generali*. Of course, only necessity of self-preservation can justify a State that has blockaded one of its own ports in preventing the egress and ingress of foreign vessels. And the question might arise whether com-

pensation ought not to be paid for losses sustained by foreign vessels so detained. See an instance given by Westlake, ii. p. 12 (n.). And see the *Oriental Navigation Company* case (decided by the General Claims Commission between the United States and Mexico), *Annual Digest*, 1927-1928, Case No. 362, and the comment thereon by Dickinson in *A.J.*, xxiv. (1930) pp. 69-78.

<sup>2</sup> And the ambassadors of the Allied Powers remained at Constantinople for some time. See Hogan, *op. cit.*, p. 76.

<sup>3</sup> See above, § 35.



vessels only. Another case of intervention was the pacific blockade instituted in 1860 by Sardinia, in aid of an insurrection against the then Sicilian ports of Messina and Gaeta, but the following year saw the conversion of the pacific blockade into a war blockade. In 1862, Great Britain, by way of reprisal for the plundering of a wrecked British merchantman, blockaded the Brazilian port of Rio de Janeiro. The blockade of the island of Formosa by France during her differences with China in 1884, and that of the port of Menam by France during her differences with Siam in 1893, are likewise cases of reprisals. On the other hand, cases of intervention are the blockade of the Greek coast in 1886 by Great Britain, Austria-Hungary, Germany, Italy, and Russia, for the purpose of preventing Greece from making war against Turkey; and further, the blockade of the island of Crete in 1897 by the united Powers. In 1902, Great Britain, Germany, and Italy blockaded, by way of reprisal, the coast of Venezuela<sup>1</sup>; and in April 1913, Great Britain, Austria-Hungary, Germany, France (with a mandate from Russia), and Italy blockaded Antivari (Montenegro).

In December 1916, during the World War, the Allied Powers blockaded the coasts of Greece, not then a belligerent, by way of reprisals for attacks by Greek forces on Allied troops in Athens. Foreign neutral ships in blockaded ports were allowed four days to depart.<sup>2</sup>

Admissibility of Pacific Blockade.

§ 45. No unanimity exists among international lawyers as to whether pacific blockades are admissible according to the principles of the Law of Nations. There is no doubt that the theory of the Law of Nations forbids the seizure and sequestration of vessels other than those of the blockaded State for attempting to break a pacific blockade. For even those writers who maintain the admissibility of pacific blockade assert this. What is controverted is whether according to International Law the coast of a State may be blockaded at all in time of peace. From the first recorded

<sup>1</sup> This blockade, although represented as a war blockade so that the ingress of foreign vessels might be prevented, was nevertheless essentially a pacific blockade. See Holland

in the *Law Quarterly Review*, xix. (1903) p. 133; *Parl. Papers, Venezuela*, No. 1 (1903), Cmd. 1399.

<sup>2</sup> See *The Times*, December 9, 1916, and *A.J.*, xii. (1918) p. 806.

instance to the last, several writers<sup>1</sup> of authority have denied that it can. On the other hand, many writers say that it may, differing among themselves only as to whether vessels sailing under the flag of third States could be prevented from entering or leaving ports under pacific blockade.<sup>2</sup>

There ought to be no doubt that the numerous cases of pacific blockade which occurred during the nineteenth century and since have, through tacit consent of the members of the Family of Nations, established the admissibility of pacific blockades for the settlement of political as well as of legal international differences.<sup>3</sup>

§ 46. It has already been stated that all writers agree that the blockading State has no right to seize and sequester such ships of third States as try to break a pacific blockade. Apart from this, no unanimity exists as to the position of ships of third States in a case of pacific blockade. Some writers<sup>4</sup> maintained that they must respect the blockade, and that the blockading State has a right to stop those which try to break it. The vast majority of writers, however, deny such a right. There is, in fact, no rule of International Law which could establish such a right, as pacific (in contradistinction to belligerent) blockade is merely a matter between the conflicting parties. The declaration of the Institute of International Law in favour of pacific blockade contains, therefore, the condition: 'Les navires de pavillon étranger peuvent entrer librement malgré le blocus.'

Pacific  
Blockade  
and  
Vessels of  
Third  
States.

Practice has varied. Before 1850, ships of third States were expected to respect a pacific blockade, and such as tried to break it were seized, and restored at the termination

<sup>1</sup> See, e.g., Hautefeuille, *Des droits et des devoirs de nations neutres* (2nd ed., 1858), ii. pp. 272-288.

<sup>2</sup> The Institute of International Law studied the question in 1887, and voted a declaration in favour of the admissibility of pacific blockades. See *Annuaire*, ix. (1887) pp. 275-301.

<sup>3</sup> It may some day be necessary for an English court to consider the effect of a pacific blockade under our Municipal Law. Bate (*A Century of Law Reform* (1901), p. 96) states that

'it was believed at the time of the Pacific Blockade of Crete that an English trader, if forcibly debarred of access to Crete by the captain of a British man-of-war forming part of the blockading squadron, would be able to recover damages against him in an English court, despite the official declaration of the blockade.' Obviously this would not be the case if the pacific blockade were proclaimed in pursuance of a Statute.

<sup>4</sup> See Heffter, § 112; Perels, § 30.

of the blockade without compensation. During the blockade of Greece in 1850 and 1886, Greek ports were closed for Greek ships only, and others were allowed to pass through. And the same was the case during the blockade of Crete in 1897. When in 1937 Japan announced a blockade of the Chinese coast she expressly declared that the blockade applied only to Chinese vessels.<sup>1</sup> On the other hand, when France instituted a blockade of Formosa in 1884 and tried to enforce it against ships of third States, Great Britain declared that a pacific blockade could not be so enforced; whereupon France had to drop her intended establishment of a pacific blockade, and consider herself at war with China. And when, in 1902, Great Britain, Germany, and Italy instituted a blockade against Venezuela, they declared it a war blockade<sup>2</sup> because they intended to enforce it against vessels of third States.<sup>3</sup>

Pacific  
Blockade  
and  
Vessels of  
the Block-  
aded  
State.

§ 47. Theory and practice seem nowadays to agree that the ships of a State under pacific blockade which try to break the blockade may be seized and sequestered. They may not be condemned and confiscated, but must be restored at its termination. Thus, although the Powers which had instituted a blockade against Venezuela in 1902 declared it a war blockade, all Venezuelan public and private ships seized were restored after the blockade was raised.

✓ Manner  
of Pacific  
Blockade.

§ 48. Pacific blockade is a measure of such serious consequences that (quite apart from the obligations of members of the League of Nations under the Covenant<sup>4</sup>) it can be

<sup>1</sup> No formal state of war existed at that time between China and Japan. *Documents*, 1937, p. 660. See also Büniger in *Z.ö.V.*, viii. (1938) pp. 689-704; Sandiford in *Diritto Marittimo*, February 1938; Chrétien in *R.G.*, xlv. (1939) pp. 274-279. And see *Spanish Government v. North of England Steamship Company* (1938), 54 T.L.R. 852. It is difficult to apply any accepted classification to the blockade proclaimed in December 1939 in connection with the Russo-Finnish hostilities (see below, p. 153.) As Russia pretended that the blockade was proclaimed by the revolutionary Government of Finland

—which other States did not recognise—it was, to the extent of its validity, a pacific blockade.

<sup>2</sup> That this blockade was essentially a pacific blockade has already been stated above, § 44. But the pacific blockades of Montenegro in 1913 and of Greece in 1916 (referred to in § 44 above) were enforced against ships of third States. See Falcke, *Le blocus pacifique* (1919), pp. 202 and 220.

<sup>3</sup> It is a moot question whether a League blockade would be a war blockade or pacific.

<sup>4</sup> See below, §§ 52a-52e.

justified only after the failure of negotiation to settle the questions in dispute. And further, as blockade, being a violation of the territorial supremacy of the blockaded State, is *prima facie* of a hostile character, it is necessary for such State as intends in time of peace to blockade another State to notify its intention to the latter, and to fix the day and hour for the establishment of the blockade. And, thirdly, although the Declaration of Paris of 1856, enacting that a blockade to be binding must be effective, concerns blockades in time of war only, there can be no doubt that pacific blockades ought likewise to be effective.

§ 49. Prior to the Covenant of the League and the General Treaty for the Renunciation of War, the value of pacific blockade as a means of non-hostile settlement of international differences was doubted by many writers. Others maintained, probably rightly, that the institution was of great value, be it as an act of reprisal or of intervention, and that every measure which is suitable and calculated to prevent the outbreak of war must be welcomed. Experience showed that pacific blockade, although not universally successful, was a measure of this kind.<sup>1</sup> That it could give, and had in the past given, occasion for abuse in the case of a difference between a strong and a weak Power, was no argument against it, as the same was valid with regard to reprisals and intervention in general, and even to war. Although it is naturally a measure which will scarcely be made use of in the case of a difference between two powerful naval States, it might nevertheless find application with success against a powerful naval State if exercised by the united navies of several Powers.<sup>2</sup> It is in this connection that it has been referred to as an instrument of collective action for enforcing the obligations of the Covenant. How far its use has otherwise been abolished or limited by the Covenant or by the General Treaty for Renunciation of

Value of  
Pacific  
Blockade.

<sup>1</sup> In only about five of the twenty-one cases of real or supposed pacific blockade analysed by Hogan in his monograph in 1908 did the blockade become warlike, with the result that war broke out.

<sup>2</sup> See Westlake, ii. p. 18: 'The best case for it is when it is employed by the Great Powers collectively in their new and growing character of the legislature of Europe. . . .'

War is discussed below.<sup>1</sup> Probably the position is here the same as in the case of reprisals.<sup>2</sup>

## V

### INTERVENTION

See the literature quoted above in vol. i. at the commencement of § 134.

Interven-  
tion in  
contradis-  
tinction to  
Participa-  
tion in a  
Differ-  
ence.

§ 50. Intervention as a means of settling international differences is only a special kind of intervention in general, which has already been discussed.<sup>3</sup> It consists in the dictatorial interference of a third State in a difference between two States, for the purpose of settling the difference in the way demanded by the intervening State. This dictatorial interference takes place for the purpose of exercising compulsion upon one or both of the parties in conflict, and must be distinguished from such an attitude of a State as makes it a party to the conflict. An intervention, for instance, takes place when, although two States in conflict have made up their minds to fight it out in war, a third State dictatorially requests them to settle their dispute through arbitration. Intervention in the form of dictatorial interference must, further, be distinguished from efforts of a State directed to inducing the States in conflict to settle their difference amicably, such as proffering its good offices or mediation, or giving friendly advice.<sup>4</sup>

Mode of  
Interven-  
tion.

§ 51. Intervention in a difference between two States takes the form of a communication to one or both of the conflicting States with a dictatorial request for the settlement of the conflict in a certain way; for instance, by arbitration, or by the acceptance of certain terms. One

<sup>1</sup> See below, §§ 52b-52e, and § 52f.

<sup>2</sup> See above, § 43.

<sup>3</sup> See above, vol. i. §§ 134-138. See also Stowell, *Intervention in International Law* (1921), containing a valuable bibliography; Widmer, *Der Zwang im Völkerrecht* (1936), pp. 91-122; Winfield in *B.Y.*, 1922-1923, pp. 130-149, and 1924, pp. 149-162;

Lawrence, § 62; Potter in *Hague Recueil*, 1930 (ii.), pp. 658-671.

<sup>4</sup> For an express prohibition of intervention in the internal or external affairs of the Contracting Parties see the Protocol Relative to Non-Intervention signed on December 23, 1936, at the Inter-American Peace Conference: *Documents*, 1936, p. 584.

State may intervene alone, or several States may intervene collectively. Of special importance are the collective interventions exercised by several great Powers in the interest of the balance of power, and of humanity.<sup>1</sup> The relation of intervention to the Covenant of the League is discussed below.<sup>2</sup>

§ 52. An intervention in a difference between two States can take place at any time from the moment a conflict arises till the moment it is settled, and even immediately after the settlement. In many cases interventions have taken place before the outbreak of war between two States, for the purpose of preventing war; in other cases third States have intervened during a war which had broken out in consequence of a conflict.<sup>3</sup>

Time of Intervention.

## VI

### COMPULSIVE MEANS OF SETTLEMENT AS BETWEEN MEMBERS OF THE LEAGUE

Schücking und Wehberg, pp. 492-498, 507-510—Report of Committee of Jurists on the Corfu-Janina affair, *Off. J.* (1924), pp. 523-527, and *B.Y.*, 1924, pp. 179-181—Petrascu, *Les mesures de contrainte internationale qui ne sont pas la guerre entre membres de la Société des Nations* (1927)—Röttger, *Die Voraussetzungen für die Anwendung von Völkerbundzwangsmassnahmen* (1931)—Hindmarsh, *Force in Peace (Force Short of War in International Relations)* (1933), and in *A.J.*, xxvi. (1932) pp. 315-326—Wright in *A.J.*, xviii. (1924) pp. 536-544, and xxvi. (1932) pp. 362-368—Maccoby in *Cambridge Law Journal*, 1924, at p. 70—Politis in *R.G.*, xxxi. (1924) pp. 5-16—Strupp, *ibid.*, pp. 255-284—Guani, *ibid.*, pp. 285-290—Ch. de Visscher in *R.I.*, 3rd ser., v. (1924) pp. 377-396—Cavaglieri in *Rivista di diritto pubblico*, June 1924—McNair in *Grotius Society*, xi. (1926) pp. 29-50—Ténékidès in *R.I.*, 3rd ser., vii. (1926) pp. 398-418—Verdross in *Hague Recueil*, 1929 (v.), pp. 493-496—Schücking, Rühland, and Böhmert in *Z.V.*, xvi. (1932) pp. 532-551—Brierly in *Cambridge Law Journal*, iv. (1932) pp. 308-319—Fischer Williams, *ibid.*, v. (1933) pp. 1-21—Lauterpacht in *A.J.*, xxviii. (1934) pp. 43-60.

§ 52a. The question has arisen whether the effect of the Covenant of the League is to place any restriction, as

Effect of the Covenant as between Members of the League.

<sup>1</sup> See above, vol. i. §§ 136, 137.

<sup>2</sup> See below, § 52c.

<sup>3</sup> With regard to the question of the right of intervention, the ad-

missibility of intervention in default of a right, and to all other details concerning intervention, the reader must be referred to vol. i. §§ 135-138.

The Corfu Incident.

between members of the League, upon recourse to these compulsive means of settling State differences. The Covenant, as we have seen, restricts the right to resort to 'war,' and declares 'any war or threat of war' to be a matter of concern to the whole League; but 'war,' as we shall see later, is a highly technical term, and the Covenant does not specifically deal with compulsive measures, which in intent and in initiation do not amount to 'war,' however likely to result in or produce war before long. When Italy bombarded and occupied Corfu in August 1923 as a reprisal for the murder of General Tellini and members of his suite at Janina, no war resulted between Italy and Greece.<sup>1</sup> The Conference of Ambassadors, which settled the dispute between those two countries, directed Greece to pay an indemnity to Italy on the ground of negligence in the search for and detection of the guilty persons. But the incident, apart from the moral issue, had raised certain questions of the interpretation of the Covenant which the Council referred in an abstract form to a Committee of Jurists.<sup>2</sup> One of these questions and its answer demand attention:

QUESTION 4. 'Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one member of the League of Nations against another member of the League, without prior recourse to the procedure laid down in these Articles?'

ANSWER 4. 'Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.'

Thus it was put on record by the Committee of Jurists

<sup>1</sup> For summary of facts see B.Y., 1924, 251.

<sup>2</sup> For criticisms of the incident see Wig in *Illinois Law Review*, xvi (1923) pp. 131-149; Hill in

A.J., xviii. (1924) pp. 98-104; Conwell-Evans, *The League Council in Action* (1929), pp. 73-82. See also Hudson in *A.S. Proceedings*, 1924, pp. 126-132.

and accepted by the Council of the League<sup>1</sup> that the obligation of Article 12 of the Covenant, 'in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council,' is not necessarily violated by the use of 'coercive measures,' even when—for such seems to be the fair inference from the circumstances giving rise to the interpretation by the jurists—those coercive measures involve the application of force. If this interpretation is correct, it indicates a serious defect in the Covenant which demands amendment. It may be, as has been suggested,<sup>2</sup> that a dispute which gives rise to forcible reprisals is 'a dispute likely to lead to a rupture' which under Article 12 must be submitted to 'arbitration or judicial settlement or to inquiry by the Council'; but so long as it is arguable by a member of the League that it is, whether the dispute is submitted to one of these processes or not, entitled to resort to forcible reprisals without breaking the Covenant and incurring the sanctions of Article 16, the defect in the Covenant is a grave one. Possibly the solution lies in an amendment designed to indicate which compulsive measures involve a breach of the Covenant if resorted to without prior recourse to a peaceful solution under Article 12 and without the stipulated moratorium, and which do not; and attempts have already been made<sup>3</sup> to draw this distinction.<sup>4</sup>

§ 52aa. The Manchurian dispute, which broke out in September 1931, between China and Japan, abundantly illustrated the dangers of the present wording of the Covenant. In the course of that conflict,<sup>5</sup> in the words of

The Manchurian Dispute between China and Japan.

<sup>1</sup> On March 13, 1924: see *Off. J.*, 1924, pp. 523-527. This decision of the Council was relied upon by the representative of Greece, when defending his Government before the Council after the invasion by Greek troops of Bulgarian territory in October 1925: see *Off. J.*, 1926, at p. 115.

<sup>2</sup> By Ch. de Visscher in *R.I.*, 3rd ser., v. (1924) at p. 385.

<sup>3</sup> By Ch. de Visscher, *loc. cit.*, and Schücking und Wehberg, p. 510.

<sup>4</sup> See generally on the matter,

McNair in *Grotius Society*, xi. (1926) pp. 29-50.

<sup>5</sup> For the authoritative presentation of the merits of the dispute on both sides and, generally, for the history of the dispute see the *Off. J.* of the League and the Records of the Meetings of the Assembly and the Council. See also Toynbee, *Survey*, 1932, pp. 395-505, and 1933, pp. 458-518; Yusuke Tsurumi, *Le conflit sino-japonais* (1932); Morley, *The Society of Nations* (1932), pp. 433-499; Hudson, *The Verdict of the League: China and Japan in Man-*



the Final Report adopted unanimously by the Assembly, 'without declaration of war, a large area of what was indisputably the Chinese territory has been forcibly seized and occupied by the armed forces of Japan and has, in consequence of this operation, been separated from and declared independent of China.'<sup>1</sup> This was not, according to the finding of the Report, an action falling within the category of self-defence.<sup>2</sup> Moreover, in connection with the events in Manchuria, there took place at the beginning of 1932 widespread hostilities in the neighbourhood of Shanghai initiated by Japan and waged by troops under the command of the Japanese and Chinese Governments. But neither country declared war upon the other, and there was apparently absent in both parties the wish to bring about a formal state of war.<sup>3</sup> The Report of the Assembly declared that 'this is not a case in which one country has declared war on another country without previously exhausting the opportunities for conciliation provided in the Covenant of the League of Nations.'<sup>4</sup> And although the Report left no doubt that the situation resulting from the action of Japan was contrary to the Covenant and that it was incumbent upon the members of the League not to recognise the situation thus brought about,<sup>5</sup> at no stage of the dispute was there a declaration, with all its accompanying consequences,

churia (World Peace Foundation, 1933); Shinobu, *International Law in the Shanghai Conflict* (1933); Wiloughby, *The Sino-Japanese Controversy and the League of Nations* (1935); Stimson, *The Far Eastern Crisis* (1936); Fischer Williams in *Political Quarterly*, April-June 1932; Lauterpacht, *ibid.*, and in *A.J.*, xxviii. (1934) pp. 43-60; Lord Lytton in *International Affairs*, xi. (1932) pp. 737-756; Anon. in *R.I. (Paris)*, ix. (1932) pp. 98-225; Hoor in *Acta Scandinavica*, iii. (1932) pp. 170-208; Wright in *A.J.*, xxvii. (1933) pp. 509-516, and *American Political Science Review*, xxvi. (1932) pp. 45-76; Gottschalk in *Z.V.*, xvii. (1933) pp. 188-259, 289-341; Yuen-Li Liang, *ibid.*, pp. 1-12; Moncharville in *R.G.*, xl. (1933) pp. 206-244; Gonsiorowski in *New York University Law Quarterly Review*, xiii. (1936) pp. 216-243. For a very com-

plete selection of documents see *Documents*, 1932, pp. 240-396, and 1933, pp. 493-498. The Final Report is also printed in *A.J.*, xxvii. (1933) pp. 119-152.

<sup>1</sup> Draft Report (as adopted): League Doc. A. (Extr.) 22. 1933. VII.

<sup>2</sup> *Loc. cit.*

<sup>3</sup> In the case of Japan the obvious reason for restraint was the unwillingness to incur the indisputable charge of a clear violation of the Covenant; in the case of China the explanation was, probably, the reluctance, which proved to be well founded, to exchange the comparative security of hostilities limited in scope and character for a formal state of war to be followed by the repressive action of the members of the League against Japan.

<sup>4</sup> League Doc. A. (Extr.) 22. 1933. VII.

<sup>5</sup> See below, p. 138.

to the effect that Japan had resorted to war contrary to the provisions of the Covenant. Members of the League would have been fully entitled by the existing wording of the Covenant to adopt the view that resort to war had taken place in violation of the Covenant.<sup>1</sup> On the other hand, it is probable that by refraining from considering Japan as having committed a breach of the Covenant, members of the League did not themselves become formally guilty of a patent disregard of their legal obligations. For the present wording of the Covenant is, in referring to 'resort to war' in Articles 12 and 16,<sup>2</sup> sufficiently elastic to leave to members of the League a large measure of discretion.

§ 52ab. The subsequent history of the League demon- Cases of  
strated that in cases of obvious acts of aggression on a Declared  
large scale the elasticity of the prohibition of 'resort to 'Resort  
to War.'

<sup>1</sup> See Lauterpacht in *A.J.*, xxviii. (1934) pp. 43-60.

<sup>2</sup> The reader will note the following three principal interpretations of the term 'resort to war' as used in Article 12: (1) It may mean resort to war in its technical meaning. The principal considerations in favour of this construction are (a) the fact that 'war' is a *terminus technicus* in International Law, and as such has a definite meaning which cannot be disregarded, and (b) that that term was in 1919 deliberately substituted for the wide prohibition of resort to 'force' as it appeared in the original drafts of the Covenant. (For an account of these changes see Röttger, *op. cit.*, pp. 14-16, and Hindmarsh, *op. cit.*, p. 13. On the other hand, see Hunter Miller, *My Diary of the Conference of Paris*, V. Doc. 396, p. 277, for an intimation that that alteration was regarded by some as a mere 'change in verbiage.') In fact, although several acts of force, not accompanied by a declaration of war, against members of the League have occurred in the course of its existence, on no occasion has there been an express declaration that there has taken place 'resort to war.' (2) It may mean resort to armed force. This view is supported by pronouncements of individual jurists (see, e.g., Briery, Fischer

Williams, Schücking, and others as cited above) and of League Committees (see, e.g., the report of the International Blockade Committee in February 1921: League Doc. A. 14. 1927. V. p. 17; Report of the Third Committee of the Assembly in 1921, *ibid.*, p. 32; and see Doc. A. 24 (1). 1921. V. p. 12) as well as by the consideration that a literal interpretation of the term 'resort to war' might enable an unscrupulous State to evade the obligations of the Covenant by refraining, so far as it is in its power, from bringing about a formal state of war and thus reducing the Covenant to an absurdity. (3) Finally, 'resort to war' may mean not every act of force, but such acts of armed force as members of the League consider, having regard to all the circumstances, to constitute war in the contemplation of the Covenant. This was to a large extent the view of the Committee of Jurists in 1924 in connection with the powers of the Council in the matter. Obviously any expression of opinion on such a question on the part of the Council would be of most material and authoritative assistance for the members of the League in forming the view as to whether particular action amounts to resort to war in the meaning of the Covenant.

war' is not altogether destructive of the legal value of the Covenant. Thus in connection with the dispute and the war between Bolivia and Paraguay in 1934 and 1935 the Assembly found, in a somewhat circuitous fashion, that, in view of the acceptance by Bolivia of the unanimous recommendation of the Assembly, Paraguay must refrain from resorting to war against Bolivia—a decision which Paraguay disregarded with the result that partial measures of discrimination, not amounting to sanctions under Article 16, were adopted against her.<sup>1</sup> When Italy invaded Abyssinia in 1935 and opened hostilities on a large scale, a Committee of six members of the Council, in a report approved by all members of the Council with the exception of the parties to the dispute, found that a state of war existed between Italy and Abyssinia, that the Italian Government 'has resorted to war in violation of its covenants under Article 12 of the Covenant of the League of Nations,' and that 'it is not necessary that war should have been formally declared for Article 16 to be applicable.'<sup>2</sup> When Japan invaded China in 1937 the Assembly, acting under Article 17, had no difficulty in holding that Japan, who was at that time no longer a member of the League and was therefore not bound by the prohibitions of the Covenant, had violated her obligations under the Pact of Paris in the matter of renunciation of war as an instrument of national policy.<sup>3</sup>

<sup>1</sup> See below, p. 603. And see *Off. J.*, Special Suppl. Nos. 124, 132-133, 134-135.

<sup>2</sup> *Off. J.*, 1935, pp. 1223-1225; Cmd. 5071. As to the Italo-Abyssinian war and the proceedings before the League see Salis, *Il conflitto italo-abissino e la Società della nazioni* (1936); Mandelstamm, *Le conflit italo-éthiopien devant la Société des Nations* (1937); Rousseau, *Le conflit italo-éthiopien devant le droit international* (1938) (a valuable contribution which appeared also as a series of articles in the *Revue générale de droit international public* in 1937 and 1938); Nostitz-Wallwitz in *Z.ö.V.*, v. (1935) pp. 760-802; the same, *ibid.*, vi. (1936) pp. 680-722; Sereni in *Rivista*, 15 (1936) pp. 1-32; Wright in *A.J.*, xxx. (1936) pp. 45-56; Wil-

son, *ibid.*, pp. 80-83; Stern, *ibid.*, pp. 189-203; Spencer, *ibid.*, xxxi. (1937) pp. 614-641; Strupp in *R.G.*, 44 (1937) pp. 43-50. For collections of relevant documents see *Documents*, 1935, vol. ii. *passim*; *R.I. (Paris)*, 16 (1935) *passim*; *A.J.*, xxx. (1936), Suppl., pp. 1-57. And see, as to the application of sanctions, below, p. 140.

<sup>3</sup> See above, p. 96. The Assembly approved the Report of the Advisory Far Eastern Committee stating that the action of Japan was not justified on the basis either of existing legal instruments or on that of the right of self-defence and that it was contrary to Japan's obligations under the Nine-Power Treaty of 1922 and the Pact of Paris: *Off. J.*, Special Suppl. No. 177, p. 42. See also Mandelstamm in *Z.ö.V.*, viii. (1938) pp. 84-99; Herz

Finally, when in 1939 Russia attacked Finland, the Assembly found in effect that she had resorted to war in violation of the Covenant.<sup>1</sup>

## VII

COMPULSIVE MEANS OF SETTLEMENT BY  
INSTIGATION OF THE LEAGUE

Fauchille, §§ 985 (1)-985 (5)—Barandon, pp. 302-344—Cruchaga, § 693—Suarez, § 337—Strupp, *Wört.*, i. pp. 155-159—Schücking und Wehberg, pp. 600-636—Hoijer, pp. 434-452—Balladore Pallieri, pp. 74-88—Bollack, *La loi mondiale du boycottage douanier* (1913)—Hadjisacos, *Les sanctions internationales de la Société des Nations* (1920), pp. 176-188—Baker, *Geneva Protocol* (1925), pp. 132-169—Mitrany, *The Problem of International Sanctions* (1925), and *The Progress of International Government* (1933), pp. 142-176—Rappard, *International Relations as viewed from Geneva* (1925), pp. 128-160—Gonsiorowski, *La Société des Nations et problème de la paix*, ii. (1927) pp. 396-424—League Doc. A. 14. 1927. V. (Reports and Resolutions on the Subject of Article 16 of the Covenant)—Ray, *Commentaire du Pacte* (1930), pp. 504-536—Röttger, *Die Voraussetzungen für die Anwendung von Völkerbundzwangsmassnahmen* (1931)—Cohn, *Kriegsverhütung und Schuldfrage* (1931)—Franke, *Der Wirtschaftskampf* (1931)—*Boycotts and Peace* (A Report by the Committee on Economic Sanctions, U.S.A., ed. by Clark, 1932)—Brück, *Les sanctions en droit international public* (1933)—Wild, *Sanctions and Treaty Enforcement* (1934), pp. 130-155, 196-223—Yepes and Pereira da Silva, *Commentaire du Pacte de la Société des Nations*, vol. ii. (1935) pp. 256-317—Nantet, *Les sanctions* (1936)—Voronoff, *L'article 16 du Pacte* (1937)—Göppert, *Der Völkerbund* (1938), pp. 491-547—*International Sanctions* (A Report by a Group of Members of the Royal Institute of International Affairs) (1938)—Laferrière in *R.G.*, xvii. (1910) pp. 288-326—Piccioni, *ibid.*, xxx. (1923) pp. 242-250—Hudson in *Harvard Law Review*, xxxviii. (1925) pp. 933-936—Taylor in *University of Pennsylvania Law Review*, December 1925, pp. 155-168—Arnold Forster in *Journal of British Institute of International Affairs*, v. (1926) pp. 1-15—Lord Lothian, *ibid.*, ix. (1930) pp. 288-324—Schücking, Rühlmann, and Böhmert in *Z.V.*, xvi. (1932) pp. 529-571—Brierly in *Grotius Society*, xvii. (1932) pp. 67-78—Bertram, *ibid.*, pp. 139-174—Wehberg in *Hague Recueil*, 48 (1934) (ii.), pp. 92-127—De Brouckère, *ibid.*, 50 (1934) (iv.), pp. 54-70—Morgenthau in *R.I.*, 3rd ser., xvi. (1935) pp. 474-503, 809-836—Fischer Williams in *B.Y.*, xvii. (1936) pp. 130-149—Schoen in *Z.I.*, 51 (1936), pp. 271-287—Bradley in *Grotius Society*, 22 (1937), pp. 13-29—

in *R.I.*, 3rd ser., xix. (1938) pp. 371-404; Chrétien in *R.G.*, xlv. (1939) pp. 229-303. For a political study (with a bibliography) of the position

of Japan in the Far East see Hindmarsh in *Hague Recueil*, 57 (1936) (iii.), pp. 101-190.

<sup>1</sup> See below, pp. 137, 143.

Cavaré in *R.G.*, xlv. (1937) pp. 385-445—Delbez in *Revue du droit public*, 1937, pp. 254-273—Schiffer in *R.I.F.*, v. (1938) pp. 113-122, 241-279, and vi. (1938) pp. 24-40 (on the origins of Article 16). And see literature cited below, § 292a.

Compulsive Means of Settlement by League Action.

§ 52b. The Covenant of the League raises the question as to how far the compulsive means of settling State differences are available to the League itself; that is, how far may the League through one of its own organs or through its members acting upon the recommendation of the League employ these means? As a matter of general principle, there is no reason why the League should not recommend that its members should employ any or all of these measures in support of the Covenant and the peace of the world. It is in these very circumstances that these weapons, being employed as 'a measure of international police,'<sup>1</sup> are least likely to be abused, and such action is in accord with the frequent employment of pacific blockade by the great European Powers in the nineteenth century. And it is not only upon the occasion of a breach of the Covenant, actually committed or imminent, that these measures might be employed; for the League has a general jurisdiction to take, and advise the taking by its members of, such action as may be necessary to secure the peace of nations.

League Intervention.

§ 52c. Intervention seems to be the correct term to apply to the action of the League in preventing the imminent outbreak of war by addressing an appeal to the parties and by reminding them, expressly or by implication, of the sanctions envisaged by the Covenant for the case of a breach of its obligations not to resort to war. This happened, for instance, in the dispute between Greece and Bulgaria in October 1925. Upon the invocation by the Bulgarian Government of Articles 10 and 11 of the Covenant the Council was immediately summoned, and telegrams were sent to both Governments reminding them of the solemn obligations of the Covenant and the grave consequences therein laid down for their breach, and exhorting them to stop military movements and withdraw their troops behind

<sup>1</sup> Hall, § 121, speaking of pacific blockade. See also Westlake's remark cited above, § 49 (n.).

their respective frontiers.<sup>1</sup> The steps taken by the Council in the dispute between Colombia and Peru in 1933 were of a similar nature. Action of this character by the League may vary from the mere offer of mediation or good offices to that dictatorial interference which amounts to intervention.<sup>2</sup>

§ 52d. The principal instrument of compulsive settlement of disputes by the action of the League are the so-called sanctions of Article 16 of the Covenant. They are properly divided into economic and military sanctions :

Article 16  
of the  
Cove-  
nant.

I. *Economic Sanctions*.—The intensity of the struggle during the World War revealed the potentialities of a new form of pressure, the so-called Economic Boycott or Blockade. To be cut off from the resources of neighbouring States and driven into isolation was found to be a terrible plight for a highly developed modern State ; and this discovery<sup>3</sup> gave prominence to the idea that by prohibiting all trade and financial relations and all personal association with the subjects of a recalcitrant State other States would be able to compel compliance with their demands. It was natural that this new means of compulsion should find a place in the constitution of a League of Nations inspired by the lessons of the War, and it is, in fact, among the first punishments to be imposed by Article 16 on a member which breaks certain of its covenants. In each particular instance its effectiveness must depend, not only upon the number of States combining to use it, but also upon the extent to which the offending State normally relies upon

<sup>1</sup> *Off. J.*, November 1925, pp. 1695-1718. See Saralief, *Le conflit gréco-bulgare d'octobre 1925 et son règlement par la Société des Nations* (1927).

<sup>2</sup> See above, § 50 ; Fauchille, § 333 (1) ; and the Report, approved by the Council and the Assembly.

<sup>3</sup> For some earlier instances of the use of the boycott in international relations see Baty, *International Law*, pp. 64-70. For a fuller account see Fauchille, i. Nos. 985 (1)-985 (5) ; (as to Chinese boycotts) Supplementary Documents to the Report of the Lytton Commission of Inquiry : Doc.

C. 663. M. 320. 1932 ; Laferrière in *R.G.*, xvii. (1910) pp. 301 *et seq.* ; Hyde and Wehle in *A.J.*, xxvii. (1933) pp. 1-10 ; Lauterpacht in *B.Y.*, 1933, pp. 125-140 ; Brown in *Canadian Bar Review*, xi. (1933) pp. 325-332 ; and see the literature cited at top of § 52b, and Hyde, ii. § 595. See also the reference to ' measures of an economic character against a defaulting Government ' in Article 414 in the Labour portion of the Treaty of Versailles ; also Spaight, *Aircraft and Commerce in War* (1926) (cited as Spaight, *Commerce*), on economic pressure in war, especially at pp. 1-21 and 173-817.

those States, the strength of its own internal resources, and its power to retaliate upon those who seek to constrain it.

The relevant paragraph of Article 16 provides that 'Should any member of the League resort to war in disregard of its Covenants under Articles 12, 13, or 15, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State, whether a member of the League or not.'<sup>1</sup>

The adoption of the measures enumerated in this paragraph was envisaged as being absolutely obligatory upon the members of the League as soon as they have satisfied themselves that there has taken place resort to war contrary to the provisions of the Covenant.<sup>2</sup>

With regard to both economic and military sanctions it must, in the first place, be noticed that it is not every breach of the Covenant which *ipso facto* brings these sanctions into play, but only resort to war in the circumstances in which war is prohibited by Articles 12, 13, or 15.<sup>3</sup> Secondly, it is now generally recognised that the effect of any such breach of the Covenant is not at once to bring about a state of war between the Covenant-breaking State and all other members of the League, and thus at once to invest each of them with the rights of a belligerent without the necessity

<sup>1</sup> An amendment was adopted by the Fifth Assembly (Protocol embodying it opened for signature on September 27, 1924), designed to have the effect of making branches (ii) and (iii) of this paragraph of Article 16 (as subdivided in the text above) apply compulsorily so far as concerns 'persons resident' in the territories of both the Covenant-enforcing and the Covenant-breaking States, and optionally as regards their respective 'nationals'; see Baker, *op. cit.*, p. 207, n. 1, and Hudson, *op. cit.*, p. 936.

The amendment has not yet received enough ratifications to make it operative.

<sup>2</sup> As to subsequent changes see below, § 52f.

<sup>3</sup> This does not mean that compulsive means, including those contemplated in Article 16, cannot be employed under other Articles of the Covenant. See the Report of a Committee of the Council in 1921 on Amendments to the Covenant: League Doc. A. 24 (1). 1921. V. [A.C. 40 (a)], pp. 11-13.

of a declaration of war.<sup>1</sup> Thirdly, each member of the League is bound and entitled to determine for itself whether a breach of the Covenant has been committed.

The economic sanctions of Article 16 fall into three branches: (i) *the severance of all trade or financial relations*: this provision seems to contemplate not only that each co-operating member of the League will itself sever any trading or financial relations between its Government and the Government of the offending State, but also that it will make it illegal under its own Municipal Law for any person resident or being or carrying on business within its territory to trade with or remit money to the Government of the offending State or with or to any person resident or being or carrying on business within the territory of the offending State, upon the analogy of the English crime of 'trading with the enemy'; (ii) *the prohibition of all intercourse between their nationals*<sup>2</sup> and *the nationals of the Covenant-breaking State*, which seems to overlap (i) above and to extend it to cover non-commercial intercourse.<sup>3</sup> It will be noted that branches (i) and (ii) merely involve the application and enforcement of the Municipal Law<sup>4</sup> of the co-operating

<sup>1</sup> See Report of the Third Committee of the Second Assembly, cited at top of § 52b. This was in fact the view expressed by the Second Assembly in one of its resolutions: see *Records of the Assembly, Plenary Meetings*, p. 803. It must also be noted that the present wording of the Covenant has replaced the original phrase, which was 'become at war with.' See Hunter Miller, *The Drafting of the Covenant* (1928), ii. p. 79.

<sup>2</sup> See above, p. 134, n. 1.

<sup>3</sup> English law prohibits non-commercial intercourse with an alien enemy equally with commercial intercourse: see *Robson v. Premier Oil and Pipe Line Co.* (1915) 2 Ch. at p. 136 (a passage approved in the House of Lords, [1918] A.C. at p. 248); see McNair, *Legal Effects of War*, p. 72.

<sup>4</sup> The Treaty of Peace Act, 1919, enables the British Government to pass Orders in Council under which these provisions can be carried out in Great Britain without further legis-

lation. This apparently was the view expressed by the British Government in 1921 in reply to an inquiry addressed to the members of the League by the Secretary-General (*Off. J.*, 1921, p. 433). (Section 1 of that Act provides as follows: 'His Majesty may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to him necessary for carrying out the said Treaty and for giving effect to any of the provisions of the said Treaty.') During the Italo-Abyssinian war the sanctions under Article 16 were put into operation by means of Orders in Council: The Treaty of Peace (Covenant of the League of Nations) Order, 1935 (S.R. & O., No. 1038) and subsequent Orders. See *Off. J.*, June 1927, for an analysis of the replies of various Governments to the request by the Secretary-General of the League for information on the matter. The French Law of 1927 provides that 'within the scope of the Covenant of the League of



States, which must if necessary supplement that law in order to enable their Governments to carry out their obligations ; (iii) *the prevention of all financial, commercial, or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State, whether a member of the League or not.* This branch of the sanction is the most serious of all. As regards the nationals of co-operating members of the League, it need not involve the exercise of belligerent rights of visit and search and blockade, because it may be assumed that the co-operating States would assent to the mutual interruption of commerce and intercourse between their nationals and those of the offending State ; and it is arguable that members of the League, whether actively co-operating or not, have assented in advance to such interruptions.<sup>1</sup> As regards the nationals of States not members of the League, it is difficult to see how their intercourse with the nationals of the offending State can be completely cut off without a declaration of war against the offending State and the exercise of the full belligerent rights against the nationals of a neutral State which would thereupon accrue. So long as any States having economic and political importance remain outside the League, this obstacle will continue to exist.<sup>2</sup>

## II. *Military Sanctions.*—While the wording of para-

Nations and in application of its provisions, particularly Articles 10, 11 (paragraph 1), 13 (paragraph 4), 16, and 17 (paragraph 4), the Government may, even in peace time, on the proposal of the Minister for Foreign Affairs, order, by decree given in the Council of Ministers, even if mobilisation has not yet been ordered, the economic and financial measures provided for in these Articles.' See on this subject Mirkin-Guetzévitch, *Droit constitutionnel international* (1933), pp. 222-224 ; Bertram in *Grotius Society*, xvii. (1932) pp. 139-174 ; Jenks, *ibid.*, xxi. (1935) pp. 1-25 ; and below, § 292a, and the *Records of the Third Assembly, Meetings of the Committees*, pp. 316-380.

It would seem that if a League blockade is desired to affect the vessels of States not members of the

League, it must be a war blockade. See Lord Robert Cecil at the Eighteenth Plenary Meeting of the First Assembly (*Records*, pp. 382-399). See particularly Report by the Secretary-General to the Council of the League, dated May 17, 1927 : League Doc. C. 241. 1927. V. See also Report by the Secretary-General of May 1927 on the legal position arising from the enforcement in time of peace of the measures of economic pressure indicated in Article 16 of the Covenant, particularly by a maritime blockade : League Doc. A. 14. 1927. V., pp. 83-88.

<sup>1</sup> See below, p. 528.

<sup>2</sup> As to the necessity, in order to make the blockade efficacious, of enforcing it against non-members of the League, see Schücking und Wehberg, p. 633, and *Records of the Second Assembly, Plenary Meetings*, p. 414.

graph 1 of Article 16 leaves no doubt that the measures provided therein were envisaged as obligatory, no such obligation was imposed by the second paragraph of Article 16 which laid down that in the case of unlawful resort to war it shall be the duty of the Council 'to recommend to the several Governments concerned what effective military, naval or air force the members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.'<sup>1</sup>

§ 52e. *Expulsion from the League*.—According to paragraph 4 of Article 16, 'any member of the League which has violated any covenant of the League may be declared to be no longer a member of the League by a vote of the Council concurred in by the representatives of all the other members of the League represented thereon.' This provision was acted upon in December 1939 when the Council, in pursuance of a recommendation of the Assembly, found that as the result of her attack on Finland Soviet Russia placed herself outside the League of Nations, and that, accordingly, she was no longer a member of the League.<sup>2</sup>

Expulsion from the League.

§ 52f. The provisions of Article 16 constitute a fundamental feature of the Covenant and a radical innovation in International Law. They give expression to the correct view that certain manifestations of unlawful conduct on the part of sovereign States are liable to repression and punishment by the collective effort of the members of the League.<sup>3</sup>

Sanctions in the Theory and the Practice of the League.

<sup>1</sup> As to these see also below, §§ 292c and 292d.

<sup>2</sup> The wording of the Resolution of the Council (*Off. J.*, 1939, p. 505) was such as to suggest that the reason for the expulsion was Russia's refusal to submit to the procedure of the Covenant. However, the Resolution must be read in conjunction with that of the Assembly to which it refers and which found that Russia had failed to observe Article 12 of the Covenant and the Pact of Paris. No formal motion for excluding a Member had previously come before the Council. In 1934 the British representative suggested that the oppression of certain sections of her negro population by Liberia might

justify her exclusion on account of violations of Article 23(b) of the Covenant relating to the treatment of native populations: *Off. J.*, 1934, p. 509.

<sup>3</sup> While the object of sanctions under Article 16 is to repress or punish unlawful resort to war, the object of the International Convention on Financial Assistance of October 1930 is to provide financial assistance by the contracting parties in the form of guarantees for the service of loans raised by a State which is attacked or threatened with attack. In the latter case the Council of the League may grant financial assistance to a State threatened by an opponent who refuses to comply with the recom-

That principle rejects the opinion that individuals ought to be able to escape the consequences of their conduct in so far as they act as States, or that the admittedly large difficulties of repression when directed against collective units must result in an immunity destructive of the possibility of an effective international order.<sup>1</sup> The principle of sanctions is only imperfectly realised in Article 16. Military measures are of an optional character. Economic measures were adopted as being of a binding nature although early in the history of the League an authoritative interpretation was adopted which made it clear that the members of the League enjoy a substantial measure of discretion in the application of the obligatory measures contemplated in Article 16.<sup>2</sup> According to that interpretation, members of

mentations of the Council. The entrance into force of the Convention is dependent upon a number of conditions, one of which is the entering into force of a General Disarmament Treaty. The Convention does not seem to have been ratified by any Great Power. See Misc. No. 13 [1931] Cmd. 3906; Barandon, pp. 103-108; Toynbee, *Survey*, 1930, pp. 89-91; *Documents*, 1930, pp. 45-60; B.Y., 1931, pp. 151 and 156; Fischer Williams in *Hague Recueil*, 1930 (iv.), pp. 81-175; Strakosch in *International Affairs*, x. (1931) pp. 208-222; Curtius in R.G., xl. (1933) pp. 326-346. See also Gorgé, *Une nouvelle sanction du droit international* (1926).

There is no element of sanction, in the meaning of Article 16, in the so-called declaration of non-recognition to the effect that it is 'incumbent upon the members of the League not to recognize any situation, treaty, or agreement which might be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris.' Such declarations were made by the Assembly in the Sino-Japanese dispute in 1932 and in the Bolivian-Paraguayan dispute in 1934 in the course of the adoption of the Final Report under Article 15. The duty of non-recognition follows, so far as members of the League are concerned, from the obligation of Article 10 to respect the

territorial integrity of the members of the League. Its legal effect is controversial and is discussed in vol. i. § 75i.

In April 1935 the Council of the League, following upon the breach of the military clauses of the Treaty of Versailles by Germany, adopted a Resolution laying down that a breach by a member of the League of its undertakings concerning the security of peoples and the maintenance of peace in Europe should 'call into play all appropriate measures on the part of the members of the League and within the framework of the Covenant' (League of Nations, Monthly Summary, April 1935). A Committee was appointed to propose measures to render the Covenant more effective in the organisation of collective security, and to define in particular the economic and financial measures to be applied to States endangering peace by unilateral repudiation of their international obligations.

<sup>1</sup> But see Brierly in *Grotius Society*, xvii. (1932) pp. 71-74 and Fischer Williams, *Aspects of Modern International Law* (1939), pp. 83-88. On corporate criminal responsibility Winn in *Cambridge Law Journal*, iii. (1929) pp. 398-415.

<sup>2</sup> See the Resolutions of the Assembly of 1921 reprinted in *Reports and Resolutions on the Subject of Article 16 of the Covenant*: Doc. A. 14. 1927. V., p. 42.

the League are bound to proceed against the aggressor State in all cases in which they (as distinguished from an organ of the League authorised to ascertain the fact of the violation of the Covenant <sup>1</sup>) may decide that the rigid condition of unlawful 'resort to war' has been fulfilled. Thus in the case of the dispute between Japan and China concerning Manchuria the members of the League were under no legal obligation to apply sanctions seeing that they availed themselves, to its full extent, of the right to exercise their discretion in determining whether unlawful 'resort to war' had taken place and refused to find that that contingency had arisen.<sup>2</sup>

However, on subsequent occasions members of the League adopted an attitude which must be regarded as a departure from their legal obligations under Article 16 of the Covenant. In the case of the war between Bolivia and Paraguay <sup>3</sup> they found, in effect, that the former was resorting to war contrary to the provisions of the Covenant. Nevertheless, apart from a partially executed prohibition of export of arms and munitions to Paraguay,<sup>4</sup> the members of the League failed to take the various measures which Article 16 renders 'immediately' operative. Subsequent to the invasion of Abyssinia by Italy in 1935 they found that Italy had been guilty of resort to war in violation of her obligations under the Covenant.<sup>5</sup> However, although the sanctions of Article 16, paragraph 1, were formally put into operation and although an elaborate machinery was set up with a view to their successive and gradual enforcement,<sup>6</sup>

<sup>1</sup> Thus the finding that Italy had been guilty of resort to war contrary to the provisions of the Covenant was not effected by a formal vote of the Council as a whole. The President of the Council, after the vote had been taken on the Report of the Council Committee on October 7, 1935, declared: 'I take note that fourteen members of the League of Nations represented on the Council consider that we are in presence of a war begun in disregard of the obligations of Article 12 of the Covenant': *Off. J.*, 1935, p. 1225.

<sup>2</sup> See above, p. 128.

<sup>3</sup> See above, p. 130.

<sup>4</sup> The prohibition of export of arms and munitions was one, but only one, of the various measures which the members of the League were bound to take under the first paragraph of Article 16.

<sup>5</sup> See above, p. 130.

<sup>6</sup> On October 10 the Assembly recommended the establishment of a committee to co-ordinate the measures to be taken against Italy. The Co-ordination Committee consisted of delegates of fifty Members of the League, i.e., of all Members with the exception of the parties to the dispute

the nature of the action taken was such as to suggest that the repressive measures were being adopted as a manifestation of moral reprobation rather than as an effective means of coercion. The sanctions were continued during the whole course of the major military operations in Abyssinia, but after the resistance of the Abyssinian forces had broken down and Italy had announced the annexation of Abyssinia in May 1936,<sup>1</sup> the Assembly took note in July 1936 of the decision of the overwhelming majority of the members of the League to put an end to the application of sanctions<sup>2</sup> and recommended that steps be taken to terminate them in so far as they were enforced by collective action under the aegis of the League.<sup>3</sup>

and Paraguay (who had previously given notice of withdrawal from the League), the Dominican Republic, Guatemala and Salvador (who were not represented at the Assembly). The work of the Committee of Co-ordination was largely conducted through a smaller Committee of Eighteen, which examined and submitted proposals for approval of the larger body. In October and November 1935 the following proposals were submitted to and approved by the Co-ordinating Committee: (1) A prohibition of export and transit of munitions and implements of war to Italy; (2) a prohibition of loans and credits to Italy; (3) a prohibition of imports from Italy; (4) a prohibition of export to Italy of transport animals, rubber, aluminium, iron ore, tin, and some other metals; (5) a provision for mutual support in the application of the economic and financial sanctions. These measures were put into operation by all States Members of the League with minor exceptions including Albania, Austria, and Hungary. As to Switzerland see below, § 292g. In November a proposal was put forward to extend the embargo upon exports so as to cover petroleum, iron, steel, and coal, but the proposal was not accepted.

On the application of sanctions during the Italo-Abyssinian war see, in addition to the literature and documents cited above in § 52ab, *International Conciliation Pamphlet* No. 315 (1935); Cmd. 5071; *Off.*

*J.*, Special Suppl. Nos. 145-150; *Documents*, 1935 (ii.), pp. 192-315, 478-550; Merceletti, *Bibliografia delle sanzioni* (1937); Serup, *L'article 16 du Pacte et son interprétation dans le conflit italo-éthiopien* (1938); Highley, *The First Sanctions Experiment* (1938); Göppert, *Der Völkerbund* (1938), pp. 528-554; Atwater, *Administration of Export and Import Embargoes by member States of the League of Nations, 1935-1936* (Geneva Studies, 1938, No. 9); Kuhn in *A.J.*, xxx. (1936) pp. 80-83; Myers, *ibid.*, pp. 124-130; Rousseau in *R.I.*, 3rd ser., xvii. (1936) pp. 5-65; Belin in *R.I. (Paris)*, 17 (1936), pp. 118-152; Bradley in *Grotius Society*, xxii. (1936) pp. 13-29. See also Deák and Jessup, *A Collection of Neutrality Laws, Regulations, and Treaties of Various Countries*, 2 vols. (1939), in which the various decrees and regulations providing for the application of sanctions are reproduced.

<sup>1</sup> See vol. i. § 239.

<sup>2</sup> The futility of governmental action was equalled, if not exceeded, by the untenable suggestion made by some writers to the effect that as the sanctions of Article 16 were, in their view, of a preventive as distinguished from a punitive nature, they ought to be abandoned as soon as the aggressor State had accomplished its object. See, e.g., Strupp in *R.G.*, xlv. (1937) pp. 49, 50.

<sup>3</sup> *Off. J.*, Special Suppl. No. 157, 1936, p. 68. One of the indirect results of the failure to apply Article 16 was the

In 1937 and 1938 the members of the League, acting in pursuance of Article 17 of the Covenant, found that Japan had resorted to war against China.<sup>1</sup> However, no repressive action as laid down in Article 16 and as enjoined by Article 17 was taken.<sup>2</sup>

The repeated failure of the members of the League to apply the binding provisions of Article 16 had a double effect. In the first instance, it was a contributory factor in weakening the system of collective security whose establishment was one of the objects of the Covenant. As a result, a number of States, instead of seeing in sanctions an effective safeguard of their own security, henceforth thought themselves justified in regarding them as a source of danger calculated to entangle them in any future conflict between the Great Powers. In the second place, the failure to fulfil the obligations of Article 16 tended to foster the view that its binding force had been destroyed as the result of an interpretation put upon that article by actual practice.

In July 1938 a group of the smaller States assembled at Copenhagen and including Sweden, Norway, Denmark, Finland, Belgium, Holland and Luxembourg, made a formal declaration to the effect that having regard to obtaining conditions and the practice followed in previous years, the system of sanctions had acquired a non-obligatory character. They asserted that economic and financial sanctions had now obtained the same optional character as military sanctions, and that the same considerations applied a

initiation, by the same resolution of the Assembly which recommended the liquidation of the sanctions against Italy, of an enquiry calculated to improve the application of the principles of the Covenant in the matter of settlement of disputes. For the documents containing various declarations by Governments on this question see *Off. J.*, Special Suppl. No. 154 (1936); for the Report of the Special Committee to Study the Application of the Principles of the Covenant see *ibid.*, No. 180 (1938).

The application of sanctions against Italy in 1935 and 1936 revealed some problems and difficulties inherent in paragraph 3 of Article 16 which pro-

vides for mutual assistance in applying sanctions and in resisting any counter-measures of the Covenant-breaking State. For the correspondence on the matter see *Documents*, 1935 (ii.) pp. 296-315. And see in particular p. 207 on Proposal No. V. on the Organisation of Mutual Support adopted by the Co-ordination Committee on October 18, 1935; Levitch, *La collaboration dans l'application des sanctions* (1938); Ruffin, *L'entraide dans l'application des sanctions* (1938); *B.Y.*, xvii. (1936) pp. 176-178.

<sup>1</sup> See above, p. 130.

<sup>2</sup> See above, p. 96, n. 4.

*fortiori* to the grant of a right of passage in conformity with Article 16, paragraph 3.<sup>1</sup> At the Assembly of that year the large majority of States, including Great Britain<sup>2</sup> and France, made declarations to a like effect. Soviet Russia and a small number of other States expressed a contrary opinion. The Assembly merely decided to communicate to all members of the League the Report registering the various views expressed on the subject. However, although a formal amendment of the Covenant in the sense contended for by most members of the League was regarded as impracticable, a point was reached at which the legal obligation to apply economic sanctions could no longer be regarded as existent. The declarations made by the vast majority of the members of the League amounted—in fact as well as in law—to a unilateral denunciation of the relevant provisions of the Covenant without regard to the machinery which Article 26 provides for its amendment. That denunciation could, not improperly, be justified by reference to a vital change in conditions, in particular having regard to the fact that the membership of the League had been considerably reduced as the result of the withdrawal of a number of States. When the war with Germany broke out in September 1939 the legal position was therefore that, while military sanctions had been of an optional nature

<sup>1</sup> For the text of the declaration see *Acta Scandinavica*, ix. (1938) p. 128. Already, in July 1936, the Scandinavian States, Spain and Switzerland had declared that in view of the changed situation and the imperfect application of the Covenant in other directions, they must regard as open the question of the application of Article 16. For the text of the declarations see *Z.ö.V.*, vi. (1936) p. 671. On the Dutch and Belgian declarations in 1937 see von Tabouillot, *ibid.*, vii. (1937) pp. 394-400. As to the Scandinavian States see Hambro, *ibid.*, viii. (1938) pp. 445-469. See also Jones, *The Scandinavian States and the League of Nations* (1939). For the Belgian declaration of October 1936 see *Documents*, 1936, pp. 220-251.

<sup>2</sup> While the British Government

emphasised in its declaration that there was no longer any unconditional obligation to take the measures contemplated in Article 16, it insisted that members of the League were not at liberty to remain indifferent to aggression, that there was a duty to consider, in consultation with other members of the League, whether and to what extent Article 16 could in any given case be applied, and that the right of any member of the League to take any measure of the kind contemplated by Article 16 remained intact. For the text of the British declaration and those of other States see the *Minutes* of the Plenary Meetings and of the Sixth Committee of the Assembly. The *Report* of the Sixth Committee on the subject is printed in Doc. C. 444. M. 287. 1938. VII.

from the outset, economic sanctions now acquired such optional character. In both cases the provisions of the Covenant constituted henceforth a mere authorisation for the members of the League to proceed or discriminate against the law-breaker if they were of the opinion that unlawful resort to war had taken place. But that very authorisation represented in itself both a significant innovation in the history of International Law and an adequate legal basis for effective action against the aggressor State.<sup>1</sup>

<sup>1</sup> In connection with the Finnish appeal in December 1939, the Assembly, after having found that Russia had failed to observe Article 12 of the Covenant and the Pact of Paris, and after having solemnly condemned the action of Russia, invited every member of the League to pro-

vide Finland with such material and humanitarian assistance as may be in its power and to refrain from any action which might weaken Finland's power of resistance: *Off. J.*, 1939, p. 540. For some aspects of the execution of that Resolution see below, pp. 507, 564.



## CHAPTER III

### RENUNCIATION OF WAR

Balladore Pallieri, pp. 98-107—Hunter Miller, *The Peace Pact of Paris* (1928)—Le Gall, *Le Pacte de Paris* (1928)—Wheeler-Bennett, *Information on the Renunciation of War* (1928)—Toynbee, *Survey*, 1928, pp. 1-48—Shotwell, *War as an Instrument of National Policy and its Renunciation in the Pact of Paris* (1929)—Myers, *Origins and Conclusion of the Paris Pact* (World Peace Foundation, 1929)—Balbareu, *Le Pacte de Paris* (1929)—Strupp, *Kellogg-Pact im Rahmen des Kriegsvorbeugungsrechts* (1929)—Wehberg, *Die Aechtung des Krieges* (1930) (*The Outlawry of War* (1931)), in *Hague Recueil*, 1928 (iv.), pp. 151-305, and in *Friedenswarte*, 38 (1938), pp. 135-149—Barandon, pp. 262-301—Cohn, *Kriegsverhütung und Schuldfrage* (1931), pp. 161-199, and in *Z.V.*, vol. xv. (1930) pp. 169-182—Stratis, *Le Pacte général de renonciation à la guerre* (1931)—Schanzer, *Il mondo fra la pace e la guerra* (1932), pp. 202-208—Göppert, *Der Völkerbund* (1938), pp. 469-490—*Round Table*, xviii. (1927-1928) pp. 455-476 and 727-743—Erich in *R.I. (Geneva)*, vi. (1928) pp. 232-240—Montluc, *ibid.*, pp. 334-345—Kerr in *International Affairs*, vii. (1928) pp. 361-388, xxiii. (1929) pp. 94-107—Colombos in *Grotius Society*, xiv. (1929) pp. 87-101—Makowski in *Bulletin*, xxi. (1929) pp. 10-20—Brierly in *B.Y.*, 1929, pp. 208-210—Kunz in *Mitteilungen der deutschen Gesellschaft für Völkerrecht*, No. 9 (1929), pp. 75 et seq.—*A.S. Proceedings*, 1929, pp. 88-108—Martin, *ibid.*, pp. 143-150—Borchard, *ibid.*, pp. 114-117, and in *A.J.*, xxiii. (1929) pp. 116-120—Descamps in *Hague Recueil*, 1930 (i.), pp. 399-555—Kelsen, *ibid.*, 1932 (iv.), pp. 132-137, and in *Z.ö.R.*, xiv. (1934) pp. 240-255—Möller in *Acta Scandinavica*, iii. (1932) pp. 94-105—Stimson in *Foreign Affairs (U.S.A.)*, xi. (1932-1933), Special Suppl. No. 1, pp. i-ix—Wright in *A.J.*, xxvii. (1933) pp. 39-61—Lauterpacht in *Grotius Society*, xx. (1934) pp. 178-202—Fischer Williams in *International Affairs*, xiv. (1935) pp. 346-368—Gonsiorowski in *American Political Science Review*, 30 (1936), pp. 653-680. See also the writers referred to below, §§ 52m and 292k.

The Place  
of War in  
International  
Law.

§ 52g. Prior to the General Treaty for Renunciation of War the institution of war fulfilled in International Law two contradictory functions. In the absence of an international organ for enforcing the law, war was a means of self-help for giving effect to claims based or alleged to be based on International Law. Such was the legal and moral authority of this notion of war as an arm of the law that in most cases in which war was in fact resorted to in order to

increase the power and the possessions of a State at the expense of others, it was described by the States in question as undertaken for the defence of a legal right.<sup>1</sup> This conception of war was intimately connected with the distinction, which was established in the formative period of International Law<sup>2</sup> and which never became entirely extinct, between just and unjust wars. At the same time, however, that distinction was clearly rejected in the conception of war as a legally recognised instrument for challenging and changing rights based on existing International Law. In the absence of an international legislature it fulfilled the function of adapting the law to changed conditions. Moreover, quite apart from thus supplying a crude substitute for a deficiency in international organisation, war was recognised as a legally admissible instrument for attacking and altering existing rights of States independently of the objective merits of the attempted change. As Hyde, writing in 1922, said: 'It always lies within the power of a State . . . to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war.'<sup>3</sup> International Law did not consider as illegal a war admittedly waged for such purposes. It rejected, to that extent, the distinction between just and unjust wars. War was in law a natural function of the State and a prerogative of its uncontrolled sovereignty.

Both these aspects of war were, in addition to their mutual inconsistency, open to juridical objections of a fundamental nature which could be satisfactorily met only by dint of a denial of the legal nature of International Law, or at least by an assertion of its weakness as a system of law. They could not be adequately answered in terms of notions derived from the law of civilised communities.<sup>4</sup> As

<sup>1</sup> For examples see Strisower, *Der Krieg und die Völkerrechtsordnung* (1919), pp. 22-25, and Lauterpacht, *The Function of Law*, pp. 364, 365. Such one-sided declarations, frequently made in notorious disregard of the law, cannot properly be regarded as a sufficient basis for the view, held by many writers, that according to positive International Law war is

admissible only as a remedy against a legal wrong.

<sup>2</sup> See below, § 63.

<sup>3</sup> Hyde, ii. p. 189.

<sup>4</sup> Thus, for instance, it is frequently pointed out that in primitive communities the enforcement of the law is left to the injured party, and that war conceived as an instrument of legal self-help is not, therefore,

an instrument for the vindication of the law, war signified a legally inadmissible identification of victorious power, wielded by the interested State, with legal right. As a means of changing the law, it constituted a radical break in the continuity of the system of International Law and was analogous to an authorisation of a revolution in the very constitution of a State. International Law regulated in time of peace the relations of States on the basis of scrupulous respect for the independence and dignity of each of them. It made the limited invasion of the sphere of interests of States through the institution of reprisals dependent upon a number of more or less clearly defined conditions. But, by the exercise of a purely discretionary right of declaring war, a State could with one stroke release itself, as against the attacked member of the society of States, from all the obligations of International Law save those appertaining to the conduct of war. It is not surprising that, faced with these difficulties, some writers preferred to regard war not as an institution recognised by International Law, but as a condition or fact found and regulated by it.<sup>1</sup>

Attempts  
to limit  
the Right  
of War.

§ 52h. The Hague Conferences of 1899 and 1907 and the movement for the pacific settlement of international disputes marked the beginning of the attempts to limit the right of war both as an instrument of law and as a legally recognised means for changing legal rights. At the same time more direct attempts were made to limit the right of war. The Hague Convention of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts prohibited, subject to certain exceptions, recourse to force as a legal remedy for enforcing obligations in respect

inconsistent with the legal nature of International Law. It is submitted that it is scientifically more appropriate to regard the institution of war, as recognised by positive International Law in the eighteenth, nineteenth, and twentieth centuries up to 1928, as inconsistent with a true system of law, than to attempt to uphold the juridical character of the international system by maintaining that in that period war was a legally

recognised reaction against a legal wrong, and nothing else.

<sup>1</sup> See, e.g., Westlake, ii. p. 3; Kohler, *Grundlagen des Völkerrechts* (1918), p. 171. It is not necessary to discuss the merits of this particular conception of war except to the extent of stating that it purports to enable International Law to regulate the incidents of conduct which may in itself be a violation of International Law.

of contracts of that nature.<sup>1</sup> The 'Bryan treaties' introduced a check upon the right of war by imposing upon the parties the duty not to begin hostilities prior to the report of the conciliation commission.<sup>2</sup> The Covenant of the League, in addition to providing for a moratorium in regard to all wars, definitely deprived members of the League of the right of war in some cases.<sup>3</sup>

While these attempts to limit the right of war as an instrument of the law were mainly procedural, more determined efforts were made to declare the illegality of 'wars of aggression,' i.e. wars undertaken in defiance of existing legal rights of other States. Article 1 of the draft of the abortive Treaty of Mutual Assistance of 1923<sup>4</sup> declared war of aggression to be an international crime. Similar terms were used in the Preamble to the abortive Geneva Protocol of 1924 which, in Article 2, laid down the obligation 'in no case to resort to war' except in specific cases enumerated therein.<sup>5</sup> In September 1927, at the instance of the Polish Delegation, the Assembly of the League adopted a resolution expressing the conviction that 'a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime,' and declaring that 'all wars of aggression are, and shall always be, prohibited,' and that 'every pacific means must be employed to settle disputes of every description, which may arise between States.'<sup>6</sup> In the Locarno Treaty of 1925<sup>7</sup> the parties mutually undertook that, subject to certain exceptions, 'they will in no case attack or invade each other or resort to war against each other.' Other similar

<sup>1</sup> See vol. i. § 135.

<sup>2</sup> See above, § 11*a*.

<sup>3</sup> See above, § 25*d*.

<sup>4</sup> League Doc. A. 35. 1923. IX. For the replies of Governments see A. 35. 1924. IX. See also Bouffard, *Le pacte d'assistance mutuelle de la Société des Nations* (1926); Wheeler-Bennett and Langermann, *Problem of Security* (1927), pp. 95-100; Hoijer, *La sécurité internationale*, ii. (1930) pp. 83-108.

<sup>5</sup> See above, § 25*d*.

<sup>6</sup> *Records of the Eighth Assembly, Plenary Meetings*, p. 84. See also

Erich in *R.I. (Paris)*, i. (1927) pp. 755-759. The Sixth Assembly, in 1925, had previously adopted a somewhat similar resolution: *Meetings of Committees*, p. 31; *Resolutions of the Sixth Assembly*, p. 21.

<sup>7</sup> See above, § 25*ai*. See also Wright in *A.J.*, xix. (1925) pp. 76-103, on 'outlawry of war' in connection with these instruments. As is pointed out below, § 52*j*, that expression must not in any case be taken literally as implying that in certain circumstances war is outside the scope of legal regulation.

treaties were concluded in that period.<sup>1</sup> In February 1928 the Sixth Pan-American Conference adopted a resolution declaring that as 'war of aggression constitutes a crime against the human species . . . all aggression is illicit and as such is declared prohibited.'<sup>2</sup>

Renuncia-  
tion of  
War as an  
Instru-  
ment of  
National  
Policy.

§ 52i. These attempts received an authoritative and practically universal expression in the General Treaty for Renunciation of War. This Treaty, which came about largely owing to the initiative of France and the United States,<sup>3</sup> was signed on August 27, 1928,<sup>4</sup> at Paris by representatives of fifteen Governments who on the same date invited other Governments to adhere to the Treaty. The Treaty, which is also referred to as the Pact of Paris, or the Kellogg-Briand Pact, or the Kellogg Pact, is now binding upon over sixty States, including all the Great Powers.<sup>5</sup> It is composed of a Preamble and two Articles, which it is convenient to set out in detail :

## ARTICLE I

The High Contracting Parties solemnly declare, in the names of their respective peoples,<sup>6</sup> that they condemn recourse to war for the solution of international contro-

<sup>1</sup> Thus in Article 1 of the Treaty of Friendship of June 10, 1926, France and Roumania mutually undertook that, subject to the exceptions specified in the Treaty, 'they will in no case attack or invade each other or resort to war against each other': *L.N.T.S.*, 58, p. 227. Similar treaties were concluded by Soviet Russia with Lithuania in September 1926, *ibid.*, 60, p. 145, and with Persia in October 1927, *ibid.*, 112, p. 275; between France and Yugoslavia in November 1927, *ibid.*, 68, p. 373; and some others. For a fairly complete enumeration see Wasmund, *Die Nichtangriffspakte* (1935), Appendix 2. See also Hill, *Post-War Treaties of Security and Mutual Guarantee* (International Conciliation Pamphlet No. 244, November 1928).

<sup>2</sup> See *A.J.*, xxii. (1928) pp. 356, 357; Alvarez, *Panaméricanisme et la sixième Conférence Panaméricaine*

(1928), pp. 74 *et seq.*; Urrutia, *Le continent américain et le droit international* (1928), pp. 90-101; Wehberg, *The Outlawry of War* (1931), pp. 68-72.

<sup>3</sup> For the history of the conclusion of the Pact see the works of Shotwell, Hunter Miller, and Myers, cited above, at p. 144.

<sup>4</sup> Treaty Series, No. 29 (1929), Cmd. 3410; *L.N.T.S.*, 94, p. 57; Martens, *N.R.G.*, 3rd ser., xxi. p. 3; *Documents*, 1928, pp. 1 *et seq.*

<sup>5</sup> For a list of States bound by the Pact in 1938 see *Harvard Research* (1939), p. 865.

<sup>6</sup> Japan originally raised objections to this phrase on the ground that under the Japanese Constitution the Emperor signs treaties in his own name, and not for his people. See Hishida, *Japan among the Great Powers* (1940), p. 275.

versies and renounce it as an instrument of national policy in their relations with one another.

## ARTICLE II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts, of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

In connection with these articles there must be read that part of the Preamble in which the signatory States express their conviction that 'all changes in their relations with one another should be sought by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty.'

The various acts of signature, ratification, or adhesion to the Pact were preceded by official statements and declarations which, without forming part of the Pact and without varying any of its provisions, are of some importance for its interpretation.<sup>1</sup>

§ 52j. The renunciation of war as an 'instrument of national policy' must be understood as referring to war in its two principal aspects as outlined above. The signatories of the Pact have renounced the right of war both as a legal instrument of self-help against an international wrong and as an act of national sovereignty for the purpose of changing existing rights.

On the other hand, the effect of the Pact is not to abolish, even for its signatories, the institution of war as such. The fact that the signatories have renounced in their mutual relations recourse to war as an instrument of national policy<sup>2</sup> means that resort to war still remains lawful—

- (a) as a means of legally permissible self-defence<sup>3</sup>;
- (b) as a measure of collective action for the enforcement

<sup>1</sup> See below, p. 153, n. 5.

<sup>2</sup> It has been suggested that this term is not sufficiently comprehensive as it may not cover 'religious' or

similar wars which are not wars of 'national policy.' See Wehberg, *The Outlawry of War* (1931), p. 99.

<sup>3</sup> See below, § 52m.

The Legal  
Effect of  
the Pact.

of international obligations by virtue of existing instruments like the Covenant of the League<sup>1</sup>;

(c) as between signatories of the Pact and non-signatories<sup>2</sup>;

(d) as against a signatory who has broken the Pact by resorting to war in violation of its provisions.<sup>3</sup> Thus when Great Britain declared war upon Germany in September 1939 that declaration was fully in accordance with the obligations of the Pact in view of the invasion of Poland by Germany and the resulting war between these two States.

These exceptions are in themselves sufficient to show that, even for its signatories, the Paris Pact has not abolished the institution of war. It could not, of course, have that effect in regard to the non-signatories. Moreover, war is possible, and must be reckoned with as an ever-present possibility, in violation of the provisions of the Pact. A war thus undertaken would be illegal, but it would still be war regulated by the accepted rules of warfare.<sup>4</sup>

The Paris  
Pact and  
the Duty  
of Pacific  
Settle-  
ment.

§ 52k. While the Paris Pact binds the parties not to seek a solution of their disputes by other than pacific means, it contains no specific obligation to submit controversies to

<sup>1</sup> This exception follows from the wording of the Pact inasmuch as it refers to war as an instrument of national policy. *Ex abundanti cautela*, it was expressly stipulated in the correspondence and the interpretations preceding the Treaty.

<sup>2</sup> Thus the Paraguayan declaration of war against Bolivia in 1933 (see above, p. 90, n. 2) was not contrary to the Paris Pact, as Bolivia had not adhered to the Pact.

<sup>3</sup> See below, § 52n.

<sup>4</sup> See below, § 61. For these and other reasons the law of war must continue to be a legitimate object of the science of International Law. While a legal system can prohibit recourse to unlawful force, it cannot always prevent it; neither can it renounce physical compulsion for the purpose of enforcing the law. In either case, especially when the opponents consist of collective units equipped with enormous resources of

power, it is desirable to provide rules intended to regulate and, if possible, to mitigate the use of force. Thus in civil war, whose occurrence cannot be avoided by the fact that Municipal Law stigmatises it as a criminal act of treason on the part of the rebels, it has been found necessary to regularise and humanise hostilities either by express recognition of belligerency (see above, § 59) or by tacit observance of the rules of warfare as established by International Law. For the suggestion that war has been abolished as an institution and that International Law must therefore be confined to the law of peace see Bustamante, *Droit international public*, i. (1934) No. 18. See also Wehberg, *Achtung des Krieges* (1930), p. 110, and *The Outlawry of War* (1931), pp. 83, 84; Descamps in *Hague Recueil*, 1930 (i.), p. 510; Alvarez, *op. cit.*, p. 77. But see Kunz and La Pradelle, referred to below, § 67.

binding settlement, judicial or otherwise. The Pact has not affected the rule of International Law according to which, in the absence of agreement to the contrary, no State is bound to submit its disputes with another State to a binding judicial decision, or, in general, to a method of settlement resulting in a solution binding upon both parties.<sup>1</sup>

This absence of any provision for binding pacific settlement and for the enforcement of the decisions rendered in pursuance thereof constitutes one of the principal defects of the Pact from the point of view of its ultimate effectiveness. It signifies a fundamental gap in the international legal system. Prior to the conclusion of the Pact, war constituted a legal remedy. Subject to some exceptions,<sup>2</sup> the Pact abolished it in that capacity without putting anything in its place. As some remedy there must be against a continued denial of a legal right, the prohibition of recourse to war may in practice become unreal either as the result of an open breach of the Pact or of recourse to force short of war on the part of the injured State.

§ 52l. The question whether the Paris Pact by forbidding resort to war has also prohibited resort to force short of war is a controversial one. Article 2 of the Pact refers to the obligation of the Contracting Parties not to solve disputes by any other except *pacific* means; and in the Preamble the Contracting Parties express their conviction that 'all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process.' In the view of some writers these provisions must be interpreted as meaning that the Pact prohibits recourse to force short of war.<sup>3</sup> But the last-quoted passage refers only to changes in relations, not to the enforcement of existing legal relations; as to Article 2, it

Resort to  
Force  
Short of  
War.

<sup>1</sup> Even if Article 2 be construed as implying the positive duty to seek the solution of disputes by pacific means, it certainly does not imply the duty to *settle* disputes in that way (for the contrary view see Hunter Miller, *op. cit.*, p. 125). As has been shown above (§ 11a), pacific means of settlement other than arbitral or

judicial settlement do not necessarily result in a settlement as a matter of legal obligation. See also Le Gall, *op. cit.*, pp. 119-121, and Stratis, *op. cit.*, pp. 105-116.

<sup>2</sup> See above, § 52j.

<sup>3</sup> See, e.g., Wright in *A.J.*, xxvii. (1933) pp. 51-54.



must be borne in mind that although measures of force short of war are compulsive means, they are still pacific means.<sup>1</sup> There ought to be no doubt that if the Paris Pact permits without restriction recourse to measures of force short of war, it is open to the same serious objections as the corresponding provisions of the Covenant,<sup>2</sup> and that its purpose may be frequently frustrated by the simple device of abstention from a declaration of war. However, the total elimination of recourse to force short of war may be difficult of achievement in practice, so long as the signatories of the Pact are free to refuse to other signatories the benefit of impartial adjudication of their legal claims, and so long as there is no provision for collective enforcement of judicial or arbitral pronouncements. Within four years of the conclusion of the Paris Pact there occurred three instances of recourse to force on a large scale on the part of signatories of the Pact without a declaration of war, namely, the hostilities conducted by Soviet Russia in 1929 against China in connection with the dispute concerning the Chinese Eastern Railway,<sup>3</sup> the occupation of Manchuria by Japan in 1931 and 1932,<sup>4</sup> and the invasion of the Colombian province of Leticia by Peru in 1932.<sup>5</sup> In all these cases one or both parties to the dispute were reminded by other signatories of their obligations under the Pact, but there was no authoritative finding to the effect that the Pact had been violated.<sup>6</sup> On the other hand, authoritative

<sup>1</sup> See above, § 27.

<sup>2</sup> At the time when the Paris Pact was negotiated and concluded the very serious difficulties arising out of the identical wording of the Covenant of the League were generally known and discussed. See above, § 52a.

<sup>3</sup> See Toynbee, *Survey*, 1929, pp. 344-369, and *Documents*, 1929, pp. 274-284. In that case Russia pleaded self-defence; it might therefore be argued that, by implication, she did not deny the applicability of the Pact (see the Russian reply of December 4, 1929, to the Note of the United States: *Documents*, 1929, p. 279).

<sup>4</sup> See above, pp. 127, 128.

<sup>5</sup> See above, p. 88, n. 4.

<sup>6</sup> In the Note of the United States to Peru of January 25, 1933, it was stated that any attempt to obtain the modification of existing treaty relations 'by a forcible and armed support of the illegal occupation of Leticia' would constitute a breach of the Paris Pact: see Toynbee, *Survey*, 1933, p. 445.

In some treaties concluded subsequent to the Paris Pact there were explicit provisions for the renunciation not only of war, but also of more clearly specified categories of armed force. Thus in the Treaty of Non-Aggression of July 1932 between Poland and Russia, the Contracting Parties undertook 'to refrain from taking any aggressive action against

pronouncements to that effect were made in connection with the invasion of Abyssinia by Italy in 1935,<sup>1</sup> of China by Japan in 1937,<sup>2</sup> and of Finland by Russia in 1939.<sup>3</sup> These invasions were followed by hostilities conducted on a large scale.<sup>4</sup> The German annihilation of the independence of Austria in 1937 and of that of Czechoslovakia in 1939, the incorporation of Albania by Italy in 1939 and the Russian invasion of Poland in the same year did not produce either actual hostilities or an international procedure culminating in a formal finding that the Pact had been violated. But there ought to be no doubt that the obligations of the Pact were disregarded in all these cases.

§ 52m. Prior to their final acceptance of the Pact, the various signatories made declarations and statements<sup>5</sup>

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Defence.

or invading the territory of the other Party,' and they agreed that 'any act of violence attacking the integrity and inviolability of the territory or the political independence of the other Contracting Party shall be regarded as contrary to the undertakings contained' in the Treaty, 'even if such acts are committed without declaration of war and avoid all warlike manifestations as far as possible': *L.N.T.S.*, 136, p. 49. See also *Documents*, 1933, p. 425, for the Polish-German Declaration of January 1934, in which these two States agreed not to have 'recourse to force in order to settle' disputes between them. These treaties were violated by Russia and Germany in 1939, but they are of some historical importance. And see, for other similar treaties, Wasmund, *Die Nicht-angriffspakte* (1935), Appendix 2.

Whether the Pact prohibits both war and measures of force short of war, or only the former, it probably prohibits the threat of such action in so far as it prohibits the action itself. This means that under the régime established by the Pact an ultimatum (see below, § 95) is normally unlawful, as it amounts to an anticipatory breach of the Pact.

<sup>1</sup> See the Report of the Committee of Six adopted by the Council of the League on October 7, 1935: *Off. J.*, 1935, pp. 1223-1226. And see above, p. 130.

<sup>2</sup> For the finding of the Assembly to the effect that the action of Japan was contrary to the Pact of Paris see below, p. 155.

<sup>3</sup> *Off. J.*, 1939, p. 540. And see above, p. 137, and below, § 93 (n.).

<sup>4</sup> The fact that these were not accompanied by a declaration of war was due either to the desire of one or both belligerents not to impair the prospects of assistance from third States by bringing about a formal status of neutrality or to the wish of the aggressor State to remain within the technical limits of the Pact. In the case of the Russo-Finnish war Russia purported that she was merely assisting the revolutionary Government which she had recognised as the legitimate Government of Finland.

<sup>5</sup> These are contained mainly: (a) in the correspondence preceding the signature of the Pact by the original signatories and the answers of the States invited to adhere to the Pact. This correspondence will be found in the works of Shotwell, Hunter Miller, Myers, and others cited above at p. 144; (b) in governmental statements and reports of committees before the legislatures of the various States. For a survey and analysis of these see Mandelstam in *R.G.*, xl. (1933) pp. 537 *et seq.*; xli. (1934) pp. 179 *et seq.* As to the value of both these kinds of preparatory work for the interpretation of the Pact see Wright in *A.J.*, xxiii.

reserving for themselves the right to have recourse to war in self-defence and to judge for themselves whether a situation has arisen calling for such action.<sup>1</sup> It is not believed that these statements and declarations have impaired the legal effect of the Pact to any appreciable degree. The right to use force (which in relations of States may assume the form of war) in self-defence constitutes a permanent limitation of the prohibition of recourse to force in any system of law. Equally, it is of the essence of the conception of self-defence that recourse to it must, in the first instance, be left to the unfettered judgment of the party which deems itself to be in danger. This being so, undue importance need not be attached to these various declarations in so far as they reserve for the interested States the right to judge whether there has arisen a case of resort to war in self-defence. Such a faculty must be understood as referring to the determination of the right to immediate action when there is *periculum in mora*.<sup>2</sup> But elementary principles of

(1929) pp. 97-104; Fachiri, *ibid.*, pp. 745-752; Marshall Brown, *ibid.*, pp. 819-824; and Lauterpacht in *Hague Recueil*, 48 (1934) (ii.), pp. 809-812. As the declarations and statements in question merely substantiate the generally recognised principle of self-defence, the importance of their relevance as a factor in the interpretation of the Pact has probably been exaggerated.

<sup>1</sup> See, e.g., the reply of France of July 14, 1928, to the identic Note of the United States as sent to the original signatories of the Pact: 'Nothing in the new treaty restrains or compromises in any manner whatsoever the right of self-defence. Each nation in this respect will always remain free to defend its territory against attack or invasion; it alone is competent to decide whether circumstances require recourse to war in self-defence.' This and other Notes will be found in the works, cited above, of Shotwell, Hunter Miller, and Myers. Some States elaborated in some detail their conception of self-defence. Thus while the United States included in the right of self-defence the right to maintain the Monroe doctrine (see vol. i.

§ 139) as part of their system of national defence, Great Britain pointed to the existence of 'certain regions of the world the welfare and integrity of which constitute a special and vital interest' of the peace and safety of Great Britain and the protection of which from attack must be regarded as a measure of self-defence (British Note of May 19, 1928: see *Omd.* 3109 and 3153).

<sup>2</sup> See Lauterpacht, *The Function of Law*, pp. 177-182; Wright in *A.J.*, xxvii. (1933) pp. 41-50. And see generally on the conception of self-defence in this connection Cavaglieri, *Corso di diritto internazionale* (1934), pp. 528-541; Verdross in *Hague Recueil*, 1929 (v.), pp. 481-490; Descamps, *ibid.*, 1930 (i.), pp. 469-477; Le Fur, *ibid.*, 1932 (iii.), pp. 535-542; Wehberg, *The Outlawry of War* (1931), pp. 100-103; Le Gall, *op. cit.*, pp. 98-107; Stratis, *op. cit.*, pp. 138-174; Spaight in *Journal of Comparative Legislation and International Law*, 3rd ser., xiv. (1932) pp. 20-29; Cohn, *Kriegsverhältnis und Schuldfrage* (1931), pp. 115-141; Borchard in *A.J.*, xxiii. (1929) pp. 116-120; Giraud in *Hague Recueil*, 49 (1934) (iii.), pp. 691-805; and the

interpretation preclude a construction which gives to a State resorting to an alleged war in self-defence the right of ultimate determination, with a legally conclusive effect, of the legality of such action. No such right is conferred by any other international agreement. The Paris Pact, it is true, contains no obligation to submit the disputed question of self-defence to a judicial decision. But this is a feature not confined to the Pact; it is common to all international treaties which are not governed by a general arbitration treaty or by a special compromissory clause.

The legality of recourse to force in self-defence is in each particular case a proper subject for impartial determination by judicial or other bodies. The task of judges or governments determining that question may legitimately be assisted by laying down in advance in what circumstances recourse to force, including war, must be regarded *prima facie* as a measure of self-defence. Such circumstances constitute aggression on the part of the State against which the measures of self-defence are directed. In a number of treaties States have adopted a definition of aggression,<sup>1</sup> and,

writers on the definition of aggression referred to below, p. 156. See also Strupp, *Das völkerrechtliche Delikt* (1920), pp. 139-142, 162-164, for instances of judicial determination of questions of self-help and self-defence. And see the Report of the Lytton Commission, adopted by the Assembly, in the Manchurian dispute between Japan and China on the question whether the initial action of Japan in occupying Manchuria was justified on the ground of self-defence. The Commission held that the action of the Japanese troops could not be described as measures of legitimate defence, although it did 'not exclude the hypothesis that the officers on the spot may have thought that they were acting in self-defence': see p. 71 of the *Report*: C. 663. M. 320. 1932. VII. On the other hand, in a Resolution of October 6, 1937, the Assembly of the League adopted the Report of the Far Eastern Advisory Committee stating that the action of Japan was in violation of the Pact of Paris and that it could not be justified on the ground of

self-defence: *Off. J.*, Special Suppl. No. 169, p. 148; *Documents*, 1937, p. 697.

<sup>1</sup> See, e.g., the Convention for the Definition of Aggression of July 3, 1933, between Russia and Afghanistan, Esthonia, Latvia, Persia, Poland, Roumania, and Turkey: *Documents*, 1933, p. 230. (Similar conventions were signed by Russia with some other States: *ibid.*, p. 232.) According to Article II. of the Convention, the aggressor in an international conflict 'will be considered the State which will be the first to commit any of the following acts:

1. Declaration of war against another State;
2. Invasion by armed forces, even without a declaration of war, of the territory of another State;
3. An attack by armed land, naval, or air forces, even without a declaration of war, upon the territory, naval vessels, or aircraft of another State;
4. Naval blockade of the coasts or ports of another State;
5. Aid to armed bands formed on

in a system in which war has been renounced as a remedy for legal or moral wrongs, further attempts in that direction cannot be regarded either as legally unsound or as inimical to justice.<sup>1</sup>

the territory of a State and invading the territory of another State, or refusal, despite demands on the part of the State subjected to attack, to take all possible measures on its own territory to deprive the said bands of any aid and protection.'

This definition followed closely the definition of aggression proposed in May 1933 by the Committee on Security Questions of the Disarmament Conference: League Doc. Conf. D.C.G./108 and 108a; *Documents*, 1933, pp. 218-226. The Draft Convention submitted by Great Britain to the Disarmament Conference in 1933 contained a definition of 'resort to war' within the meaning of Article 16 of the Covenant which followed closely, except as to Part 4, the definition quoted above: *Documents*, 1933, p. 227. See also the treaties referred to above in § 52l (p. 152, n. 6) and limiting recourse to armed force.

<sup>1</sup> It is commonly, but erroneously, assumed that the adoption of a definition of aggression necessarily deprives governments or tribunals of the freedom of appreciation of the merits of a particular situation. No definition acts automatically. It must always be a matter for a judicial tribunal, or a State, or any other agency entitled to form a judgment, to apply the elements of the definition to the case before it. These agencies must be trusted to be able to avoid absurdities or injustice which may result from the peculiarities of a given situation. In the sphere of Municipal Law there is no serious attempt to prevent the adoption of definitions of various crimes on the ground that their rigid application may result in injustice. The law relies on the skill of draftsmen and the wisdom of courts. Definitions represent that element of certainty in the operation and observance of the law which is no less essential in international relations than within the State. A definition of aggression

may also be instrumental in making it more difficult for States to pursue a policy of treating the conception of self-defence as identical with the defence of any interest to which they attach importance.

On the question of definition of aggression see Eagleton, *The Attempt to Define Aggression* (International Conciliation Pamphlet No. 264, November 1930), and in *R.G.*, xxxix. (1932) pp. 498-511; Wehberg, *The Outlawry of War* (1931), pp. 105-108; Vignol, *La définition de l'agresseur dans la guerre* (1933); Fischer Williams, *Some Aspects of the Covenant of the League of Nations* (1934), pp. 229-242; Reichhelm, *Der Angriff* (1934); Hertz, *Das Problem des völkerrechtlichen Angriffs* (1935); Wassmund, *Die Nichtangriffspakte* (1935), pp. 2-67; Diamandescu, *Le problème de l'agression* (1936); Thery, *La notion d'agression en droit international* (1937); *International Sanctions* (A Report by a Group of Members of the Royal Institute of International Affairs) (1938), pp. 177-187; Baak in *Z.ö.R.*, vi. (1926) pp. 367-380; Shotwell, *op. cit.*, pp. 203-213; Undén in *R.I.*, 3rd ser., xii. (1931) pp. 262-267; Schücking, Rühlmann, and Böhmert in *Z.V.*, xvi. (1932) pp. 532-551; Finch in *A.J.*, xxvi. (1933) pp. 725-732; Le Fur in *R.I. (Geneva)*, xi. (1933) pp. 179-191, and in *R.I. (Paris)*, xii. (1933) pp. 251-283; Braatoy in *Acta Scandinavica*, v. (1934) pp. 29-40; Lauterpacht in *Grotius Society*, xx. (1934) pp. 197-201; Wright in *A.J.*, xxix. (1935) pp. 373-396, and *ibid.*, xxx. (1936) pp. 45-56; Lederer in *R.I. (Geneva)*, xiii. (1935) pp. 119-125; Gordon in *Mélanges Mahaim*, vol. ii. (1935) pp. 134-145; Eagleton in *Z.ö.R.*, xvi. (1936) pp. 68-78; Scelle in *Esprit International*, 1936, pp. 372-393; Kopelmanas in *A.J.*, xxxi. (1937) pp. 244-257; Bilfinger in *Z.ö.V.*, vii. (1937) pp. 483-510 (on the Russian definition). On the use of the term 'aggression' in treaties and in official pronouncements see *Harvard Research* (1939), pp. 847-855.

§ 52*n*. Unlike the Covenant of the League, but like most international treaties, the Paris Pact provides no sanctions for the case of its violation. The only express sanction of the Pact is to be found not in its text proper, but in that part of the Preamble in which the signatories express their conviction that 'any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty.' This is merely an affirmation of the rule that a State is entitled to cancel a treaty broken by the other party.<sup>1</sup> If a State violates the Pact by resorting to war, both the attacked State and other signatories of the Pact are no longer bound as against it by the obligation not to resort to war as an instrument of national policy.<sup>2</sup> They assume in this matter such freedom of action as they possessed under International Law prior to the conclusion of the Pact. No other express sanction is provided in the Pact itself or intended by it. In particular, the illegality of the war undertaken in breach of the provisions of the Pact does not automatically deprive the guilty belligerent of the rights of warfare, including those resulting from the law of neutrality.<sup>3</sup> However, although the Pact itself provides for no specific sanction, a breach of its provisions constitutes an international wrong against all its signatories, who thereupon, without electing to go to war, become entitled to such redress, by way of self-help or otherwise, as the principles of State responsibility warrant. They may resort to reprisals; they acquire the right of intervention; and, both as belligerents and neutrals, they are entitled to hold the guilty belligerent responsible

The Sanction of the Pact of Paris.

<sup>1</sup> See vol. i. § 547.

<sup>2</sup> For this reason it does not appear that the Preamble to the Pact constitutes a substantial addition to its two principal articles. The discussion (see, e.g., Stratis, *op. cit.*, pp. 78-85) of the importance of the Preamble in connection with the Pact is therefore largely theoretical. The Permanent Court of International Justice has repeatedly referred to the Preamble of treaties: see, for instance, Series A, No. 15, p. 27; Series B, Nos. 2-3, pp. 25-27, 37; No. 6, p. 28; No. 13, p. 14; Series A/B, No. 50,

p. 373; No. 62, p. 13. See also Crandall, *Treaties, their Making and Enforcement* (1916), p. 403, and cases there cited. In the course of the correspondence preceding the signature of the Pact, Australia insisted, in a Note of July 18, 1928, that the Preamble must be considered as an integral part of the Pact. See also Keen in *Grotius Society*, xxi. (1936) pp. 177-190.

<sup>3</sup> See above, § 52*j*. And see below, § 292*h*, on the effect of the Pact of Paris on the law of neutrality.

for the losses sustained as the result of the war. But, as in the case of other international obligations, the absence of specific provisions for sanctions does not affect the legal character of the Pact.<sup>1</sup>

Termination of the Pact.

§ 520. The Pact is not expressly limited in point of time; neither, unlike some other instruments,<sup>2</sup> does it explicitly reject any time limit. But it may be doubted whether on account of this latter fact it can be dissolved by giving notice.<sup>3</sup> Rather, it is believed, ought it to be regarded as analogous to treaties of peace which, although concluded without an express time limit, cannot nevertheless be unilaterally denounced.<sup>4</sup> The faculty of denunciation—even if the legal effects of it were to take place after considerable delay—would not only be contrary to the avowed purpose of the Pact, but would in practice deprive it to a large extent of its effectiveness. The incorporation of provisions relating to the duration or denunciation of treaties (except in treaties of peace) has now become a practically universal rule of diplomatic practice in executory treaties, and the fact that the Pact of Paris contains no reference to its

<sup>1</sup> This means that it is neither necessary nor permissible to interpret the Pact with the view to safeguarding its legal character by reading into it specific obligations calculated to render it effective. In particular, it is not permissible to construe as a legal obligation the moral duty of the neutral signatories of the Pact to discriminate against the guilty belligerent (see below, §§ 292*b*-292*i*) or to refuse to recognise agreements or situations brought about as the result of wars undertaken in violation of the Pact. (See on this point Lauterpacht in *Grotius Society*, xxi. (1935) pp. 185-193.) But third States, signatories of the Pact, are entitled to refuse such recognition. See the identic Note of the United States to China and Japan of January 7, 1932, to the effect that the United States 'does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the

United States, are parties': *A J.*, xxvi. (1932) p. 342. And see comment thereon by Wright, *ibid.*, pp. 342-348, and the literature cited in vol. i. § 754. As to the objections against changing the law of neutrality by way of reprisals see below, § 292*i*. In so far as the science of International Law can legitimately assist the cause of the effectiveness of the Paris Pact, it can do so by showing that the Pact has paved the way for parallel changes in the law. The actual incorporation of these changes as part of International Law is a matter for Governments.

<sup>2</sup> See, e.g., below, § 194*a*, on the provision of Part IV. of the London Naval Treaty of 1930 in the matter of submarines.

<sup>3</sup> See vol. i. § 538. On the question of denunciation of treaties concluded without a time limit and containing no provision for denunciation see McNair in *Hague Recueil*, 1928 (ii.), pp. 532, 533, who gives some instances of unilateral termination of such treaties.

<sup>4</sup> See vol. i. § 538.

termination must therefore be regarded as yet another reason for holding that it was not intended to be terminable by notice. Having regard to its object and to the number of States bound by it, the Pact must be considered as having a degree of permanency comparable with that appertaining to rules of customary International Law. But, subject to that major consideration, there must be applied to it the same rules which generally apply to the termination and dissolution of treaties. Thus the Pact would be dissolved, as between the belligerents, on the outbreak of war, with the result that its provisions could, after the conclusion of peace, be binding as between them only by virtue of a new agreement.<sup>1</sup>

§ 52p. The fact that the Pact provides for the renuncia-  
tion of war as an instrument of national policy, while the  
Covenant, with some minor exceptions, merely lays down  
procedural checks upon resort to war, led to abortive  
attempts to amend the Covenant so as to bring its provi-  
sions into harmony with those of the Paris Pact.<sup>2</sup> These

The  
Covenant  
and the  
Pact of  
Paris.

<sup>1</sup> It is arguable that a war or a succession of wars between a considerable number of important signatories would remove altogether, i.e. also for other signatories, the basis of a Pact in which a substantial degree of universality may appropriately be regarded as being of the essence. It matters little whether this result is achieved by the application of the doctrine *rebus sic stantibus* or in another way. There exist a number of multilateral treaties which provide for the termination of the treaty or the right to withdraw from it in case of its denunciation by some of the signatories. See Tobin, *The Termination of Multipartite Treaties* (1933), pp. 198-200. It is not believed that any real help in interpreting this or any other aspect of the Pact of Paris can be derived from construing it as a 'legislative' treaty.

<sup>2</sup> See Misc. No. 18 [1930] Cmd. 3748 for the British proposal and other documents relating to the proposed amendments; and *Documents*, 1930, pp. 40-44. And see Gallus, *La mise en harmonie du Pacte*

*de la Société des Nations avec le Pacte de Paris* (1930), and the same in *R.I. (Paris)*, iv. (1930) pp. 7-70, and in *R.G.*, xxxvii. (1930) pp. 19-42; Schücking, *Die Revision der Völkerbundsatzung im Hinblick auf den Kellogg-Pakt* (1931), and in *Acta Scandinavica*, i. (1930) pp. 49-65; Wehberg, *The Outlawry of War* (1931), pp. 88-93; Stratis, *op. cit.*, pp. 205-235; Manning in *B.Y.*, 1930, pp. 158-171; Rutgers in *Hague Recueil*, 1931 (iv.), pp. 5-123; Anderson in *A.J.*, xxvii. (1933) pp. 105-109. For the minutes of the Committee appointed in 1930 by the Council to consider the proposed amendments see League Doc. C. 160. M. 69. 1930. V. The amendments put forward by the Committee consisted mainly in proposals to alter the text of the Covenant so as to deprive members of the League of the right to resort to war in cases in which the existing Covenant seems to concede to them such a right, namely, in Articles 12 (paragraph 1), 14 (paragraph 4), and 15 (paragraph 7). The Committee also proposed that, in view of the suggested abolition of the right of war under the Covenant,



attempts were made on the ground that the Covenant must be 'brought into line' with the Paris Pact is largely metaphorical. Actually there is no contradiction between the two instruments. The Covenant cannot perpetuate for the members of the League a right (*in casu*, a right of resort to war) of which they divested themselves in a subsequent treaty.<sup>1</sup>

The Place  
of the  
Paris Pact  
in Inter-  
national  
Law.

§ 52q. The Paris Pact constitutes one of the two most important international treaties (the other being the Covenant of the League), and it is therefore necessary to attempt to assess its place in the system of International Law. The shortcomings of the Pact, from the point of view of its professed object, have already been noted in this chapter. They are: the uncertainty as to how far the prohibition of resort to war includes measures of force short of war; the absence of any provision for authoritative ascertainment of breaches of the Pact; the failure to provide for collective enforcement of its obligations, at least to the extent of a mitigation of the rigidity of the established rules of neutrality

the unanimous recommendation of the Council under Article 15 (paragraph 7)—see § 25d—should be binding upon the parties. For the Report of the Committee of the Assembly see Doc. C. 623. M. 245. 1930. V. and Misc. No. 18 [1930] Cmd. 3748. And, for the observations submitted by the various Governments, see Docs. A. 11. 1931. V. and A. 11 (a). 1931. V. The proposed amendments were not adopted by the Assembly. The principal reason for the hesitation of some members of the League to acquiesce in the proposed amendments was the apprehension that such amendments, if accepted, might add to the existing limitations in the matter of resort to war, and thus indirectly enlarge the scope of the obligations to apply sanctions in case of violation of the Covenant.

<sup>1</sup> The effect of the Pact on the constitutional powers of competent national authorities to declare war is a matter of Municipal Law and need not be discussed here. It has been suggested—see Hunter Miller, *op. cit.*, pp. 148, 149—that the effect

in the United States might be to limit the right of Congress to declare war. See also Wehberg, *The Outlawry of War* (1931), pp. 108-110, 113-116; Mirkine-Guetzévitch, *Droit constitutionnel international* (1933), pp. 225-244; Jenks in *Grotius Society*, xxi. (1936) pp. 1-25, and below, § 93. Some States possessed prior to the Paris Pact general provisions of this nature. Thus Article 88 of the Constitution of Brazil laid down that 'In no case will the United States of Brazil engage, directly or indirectly, in wars of conquest either by themselves or in alliance with another State.' Brazil invoked this Article in explaining her refusal, in 1928, to become a signatory of the Pact. And see generally, on the constitutional limitations in the matter of declaration of war, below, § 93. For an early example of a national renunciation of war see the Decree of the French Convention of April 1792: 'La Nation française renonce à entreprendre aucune guerre dans la vue de faire des conquêtes, et n'emploiera jamais ses forces contre la liberté d'aucun peuple.'

to the disadvantage of the law-breaker<sup>1</sup>; and the absence of a duty expressly laid down in the Pact to submit disputes between its signatories to binding settlement. These defects seriously impair the political significance and the prospects of observance of the Pact. But in law the terms of the Pact are very comprehensive, and the danger of the purpose of the Pact being frustrated lies not in the normal operation of its provisions, but in the possibility of their violation by the signatories.


The Pact constitutes a radical change in International Law and a removal of the principal objection to its recognition as a system of law. Prior to the Pact the main defect of International Law as a body of law consisted not so much in the absence of an international legislature or executive as in the admissibility of war as a regular legal institution. The Pact of Paris altered that state of the law. War cannot now legally, as it could be prior to the conclusion of the Pact, be resorted to either as a legal remedy or as an instrument for changing the law. Resort to war is no longer a discretionary prerogative right of States signatories of the Pact; it is a matter of legitimate concern for other signatories whose legal rights are violated by recourse to war in breach of the Pact<sup>2</sup>; it is an act for which a justification must be sought in one of the exceptions permitted by the Pact of Paris. In law, the scope of these exceptions is small when compared with the magnitude of the change effected by the Pact in the system of International Law. The fact that within a short period after the conclusion of the Pact its provisions were repeatedly violated cannot properly be regarded as detracting from its legal significance. But these violations tended to show that the practical potentialities of general instruments of this kind run the risk of being illusory if unaccompanied by parallel developments in the direction of an effective political organisation of the society

<sup>1</sup> See below, §§ 292h-292i.

<sup>2</sup> In communicating to the League of Nations the fact that a state of war existed between them and Germany as from September 3, 1939, France

and Great Britain declared that by committing an act of aggression against Poland, Germany had violated her obligations assumed towards Poland and other signatories of the Pact of Paris: *Off. J.*, 1939, p. 386.

of States. It must remain a matter of controversy whether the injury to the authority of International Law resulting from repeated breaches of solemn obligations of this nature is sufficiently compensated by the gradual change of outlook which is bound to follow from the renunciation of the right of war as an instrument of national policy.



# PART II

## WAR



# CHAPTER I

## ON WAR IN GENERAL

### I

#### CHARACTERISTICS OF WAR

Grotius, i. c. 1, § 2—Vattel, iii. §§ 1-4, 69-72—Hall, §§ 15-18—Westlake, ii. pp. 1-5—Lawrence, § 135—Lorimer, ii. pp. 18-29—Manning, pp. 131-133—Phillimore, iii. § 49—Twiss, ii. §§ 22-29—Taylor, §§ 449-451—Wheaton, § 295—Bluntschli, §§ 510-514—Heffter, §§ 113-114—Lueder in *Holtzendorff*, iv. pp. 175-198—Heilborn in *Stier-Somlo*, i. pp. 22-25—Klüber, §§ 235-237—G. F. Martens, ii. § 263—Ullmann, § 165—Fauchille, §§ 995-1000—Pradier-Fodéré, vi. Nos. 2650-2660—Mérignhac, iii<sup>a</sup>. pp. 9-19—Rivier, ii. § 61—Nys, iii. pp. 1-28—Calvo, iv. §§ 1860-1864—Fiore, iii. Nos. 1232-1268—Martens, ii. § 106—Westlake, *Chapters*, pp. 264-273—Heilborn, *System*, pp. 321-332—De Louter, ii. pp. 212-231—Gemma, pp. 259-269—Hatschek, pp. 286-291—Kohler, § 71—Liszt, § 56—Rolin, §§ 136-144—Strupp, *Grundzüge*, pp. 169-175—Hyde, ii. §§ 596-601—Fenwick, pp. 381-385, 428-439—Keith's Wheaton, pp. 630-635—Balladore Pallieri, pp. 3-30—Spaight, *Air*, pp. 1-30—Rettich, *Zur Theorie und Geschichte des Rechts zum Kriege* (1888), pp. 3-141—Weisse, *Le droit international appliqué aux guerres civiles* (1898)—Rougier, *Les guerres civiles et le droit des gens* (1903)—Higgins, *War and the Private Citizen* (1912), pp. 3-70—Grosch, *Der Zwang im Völkerrecht* (1912), *passim*, especially p. 63—Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 174-187—Jerusalem, *Kriegsrecht und Kodifikation* (1918)—Strisower, *Der Krieg und die Völkerrechtsordnung* (1919)—Breschi, *La dottrina della guerra nel diritto internazionale* (1922)—Bryce, *International Relations* (1922), pp. 112-147—Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929), pp. 188-208—Keydel, *Das Recht zum Kriege im Völkerrecht* (1931)—Eagleton, *The Attempt to Define War* (International Conciliation Pamphlet No. 291, June 1933)—Higgins, *War and Law*, in *Cambridge Law Journal*, 1922, pp. 177-184—Wright in *A.J.*, xviii. (1924) pp. 755-767, and xix. (1925) pp. 76-103—Enriques in *Rivista*, xx. (1928) pp. 27-49, 149-173—Balladore Pallieri, *ibid.*, xxii. (1930) pp. 342-362, 509-525. And see McNair, Brierly, Fischer Williams, Wright, and Lauterpacht, referred to above, § 52a.

§ 53. As within the boundaries of the modern State an armed contention between two or more citizens is illegal, public opinion has become convinced that armed contests between citizens are inconsistent with Municipal Law. Influenced by this fact, as well as by the recent abolition of the

War and  
Inter-  
national  
Law.

right of war as an instrument of national policy,<sup>1</sup> many persons frequently consider war and law inconsistent. Such a view ignores the fact that as States are sovereign, and as consequently no central authority exists above them able to enforce compliance with International Law, war cannot, under the existing conditions, always be avoided. International Law recognises this fact, but at the same time contains obligations limiting the right to resort to war and provides regulations with which belligerents have customarily, or by special conventions, agreed to comply in case war breaks out between them. Accordingly, although with the outbreak of war peaceable relations between the belligerents cease, there remain certain mutual legal obligations and duties. Thus conceived, war is not inconsistent with, but a condition regulated by, International Law.

Concep-  
tion of  
War.

§ 54. War is a contention between two or more States through their armed forces, for the purpose of overpowering each other, and imposing such conditions of peace as the victor pleases. War is a fact recognised, and with regard to many points regulated, but not established, by International Law. Those writers<sup>2</sup> who, prior to the General Treaty for Renunciation of War, defined war as the legal remedy of self-help to obtain satisfaction for a wrong sustained from another State, forgot that wars had often been waged by both parties for political reasons only; they confounded a possible, but not at all necessary, cause of war with the conception of war. When States are driven into, or deliberately wage, war for political reasons, no legally recognised act of self-help is performed by the war; and the same laws of war are valid, whether wars are waged on account of legal differences or political differences.

War a  
Contention.

§ 55. In any case, it is universally recognised that war is a *contention*, i.e. *a violent struggle through the application of armed force*.<sup>3</sup> Unilateral acts of force performed by one State against another without a previous declaration of war

<sup>1</sup> See above, §§ 52h-52q.

<sup>2</sup> See, for instance, Vattel, iii. § 1; Phillimore, iii. § 49; Twiss, ii. § 26; Bluntschli, § 510; Bulmerincq, § 92.

<sup>3</sup> See a number of views and defini-

tions collected by McNair in *Grotius Society*, xi. (1926) pp. 31-34, and suggested definition on p. 45. See also Wright in *A.J.*, xxvi. (1932) pp. 362-368.

may be a cause of the outbreak of war, but are not war in themselves, so long as they are not answered by similar hostile acts by the other side, or at least by a declaration of the other side that it considers them to be acts of war.<sup>1</sup> Thus it comes about that acts of force performed by one State against another by way of reprisal, or during a pacific blockade in the case of an intervention, are not necessarily acts initiating war. And even acts of force illegally performed by one State against another—for instance, occupation of a part of its territory—are not acts of war so long as they are not met by acts of force from the other side, or at least by a declaration that it considers them to be acts of war.<sup>2</sup>

Though war is a contention, a violent struggle through the application of armed force, other measures may be incidentally applied in connection therewith. These include the establishment of a blockade, the prohibition of the carriage of contraband, or trading with the enemy, or the capture of sea-borne enemy property. The object of all these measures is the weakening, or destruction, of the economic power of resistance of the enemy; but it could not be achieved without the application of armed force.

§ 56. To be war, the contention must be *between States*.<sup>3</sup> War a Contention between States.  
In the Middle Ages wars between private individuals, so-called private wars, were known, and wars between corporations—as the Hansa, for instance—and States. But such wars have totally disappeared in modern times. A contention may, of course, arise between the armed forces of a State and a body of armed individuals, but this is not war. Thus the contention between the raiders under Dr. Jameson and the former South African Republic in January 1896 was not war. Nor is a contention with insurgents or with pirates a war. And a so-called civil war<sup>4</sup> need not

<sup>1</sup> On the relevance of the absence of a formal declaration of war see below, § 93 (n.).

<sup>2</sup> How far such acts of force are consistent with the existing obligations of pacific settlement is discussed above, §§ 52a, 52l.

<sup>3</sup> Note Westlake, ii. p. 1: 'War is the state or condition of Governments

contending by force.' On the question whether the laws of war govern a contest between a member of the Family of Nations and a people outside it, see above, vol. i. §§ 26-29 and 102-103; Hyde, ii. § 650; Liszt, § 56A (iif); and Wright in *A.J.*, xx. (1926) pp. 263-280.

<sup>4</sup> See below, § 59.



be war from the beginning, and may not become war at all, in the technical sense of the term in International Law. On the other hand, to an armed contention between a suzerain and its vassal<sup>1</sup> State the character of war ought not to be denied, for both parties are States, although the action of the vassal may, from the standpoint of Constitutional Law, be rebellion. Again, an armed contention between one or more member-States of a Federal State and the Federal State itself ought to be considered as war in International Law; although, according to the constitution of Federal States, war between the member-States, as well as between any member-State and the Federal State itself, is illegal, and recourse to arms by a member-State may therefore, from the standpoint of the constitution, be correctly called rebellion. Thus the War of Secession within the United States between the Northern and the Southern member-States in 1861-1865 was real war.<sup>2</sup>

War a  
Contention  
between  
States  
through  
Armed  
Forces.

§ 57. War nowadays is a contention of States *through their armed forces*. Those private subjects of the belligerents who do not directly or indirectly belong to the armed forces do not take part in it<sup>3</sup>; they do not attack and defend; and no attack ought therefore to be made upon them. This is the result of an evolution of practices totally different from those in vogue in former times. During antiquity, and the greater part of the Middle Ages, war was a contention between the whole populations of the belligerent States. In time of war every subject of one belligerent, whether an armed and fighting individual or not, whether man or woman, adult or infant, could be killed or enslaved by the other belligerent at will. But gradually a milder and more discriminating practice grew up, and nowadays the life and liberty of such private subjects of belligerents as do not directly or indirectly belong to their armed forces, and, with certain exceptions, their private property, ought to be safe.

This is generally, although in regard to private property<sup>4</sup>

<sup>1</sup> See below, § 75.

<sup>2</sup> Some might prefer to say that such a contention *becomes* war upon the grant of recognition of belliger-

ency; see below, § 59.

<sup>3</sup> See, however, below, § 57a.

<sup>4</sup> See Fischer Williams, *op. cit.*, pp. 188-208.

not universally, admitted. But opinions disagree as to the general position of private subjects in time of war. The majority of the European Continental writers for three generations before the World War propagated the doctrine that no relation of enmity existed between belligerents and such private subjects, or between the private subjects of the respective belligerents. This doctrine went back to Rousseau.<sup>1</sup> In 1801, at the opening of the French Prize Court, the famous lawyer and statesman Portalis adopted Rousseau's<sup>2</sup> doctrine by declaring that war is a relation between States, and not between individuals, and that consequently the subjects of the belligerents are only enemies as soldiers, not as citizens. Although this new doctrine did not<sup>3</sup> spread at once, from the second half of the nineteenth century it was proclaimed on the European Continent by the majority of writers. British and American-English writers, however, never adopted it, but always maintained that the relation of enmity between the belligerents extends also to their private citizens.

It is believed that, if the facts of war, especially when viewed in the light of the developments during and after the World War,<sup>4</sup> are taken into consideration without prejudice, there ought to be no doubt that the British and American view is correct.<sup>5</sup> It is impossible to sever the citizens from their State, and the outbreak of war between two States cannot but make their citizens enemies. The dispute is to a large extent only one of terms without any material consequences.<sup>6</sup> For, apart from terminology, there is agreement in substance upon the rules of the Law of Nations regarding such private subjects as do not directly or indirectly belong to the armed forces.<sup>7</sup> Nobody doubts

<sup>1</sup> *Contrat social*, i. c. 4.

<sup>2</sup> See Lassudrie-Duchêne, *Jean Jacques Rousseau et le droit des gens* (1906).

<sup>3</sup> As Hall (§ 18) shows.

<sup>4</sup> See below, § 57a.

<sup>5</sup> See Boidin, pp. 32-44, and Jerusalem, *op. cit.*, p. 29.

<sup>6</sup> But many Continental writers made use of Rousseau's dictum in

order to defend certain contentions. See Oppenheim, *Die Zukunft des Völkerrechts* (1911), pp. 59-61: translation into English (1921), § 72. See also Hall's remark (§ 18): 'It is the argumentative starting-point of the attack upon the right of capture of private property at sea.'

<sup>7</sup> See Breton, *Les non-belligérants: leurs devoirs, leurs droits, et la question des otages* (1904).

that they ought to be safe as regards their life and liberty, provided they behave peacefully and loyally; and that, with certain exceptions, their private property should not be touched. On the other hand, nobody doubts that, according to a generally recognised custom of modern warfare, the belligerent who has occupied a part or the whole of his opponent's territory, and treats such private individuals leniently according to the rules of International Law, may punish them for any hostile act, since they do not enjoy the privileges of members of armed forces. Although International Law by no means forbids, and, as a law between States, is not competent to forbid, private individuals to take up arms against an enemy, it does give a right to the enemy to treat hostilities committed by them<sup>1</sup> as acts of illegitimate warfare. A belligerent is under a duty to respect the life and liberty of private enemy individuals, which he can carry out only on condition that they abstain from hostilities against him. Through military occupation in war they fall under the military authority (but not territorial supremacy)<sup>2</sup> of the occupant, and he may therefore demand that they shall comply with his orders regarding the safety of his forces. The position of private enemy individuals is made known to them through the proclamations which the commander-in-chief of an army occupying the territory usually publishes.

Owing to their position it is inevitable that he should consider and mark as criminals such of them as commit hostile acts, although they may be inspired by patriotic motives, and may be highly praised for their acts by their compatriots. According to a generally recognised customary rule of International Law, hostile acts on the part of private individuals are not acts of legitimate warfare, and the offenders may be treated and punished as war criminals. Even those writers<sup>3</sup> who object to the term 'criminals' do not deny that such hostile acts by private individuals, in contradistinction to hostile acts by members of the armed forces, may be severely punished. The controversy whether

<sup>1</sup> See below, § 254.

<sup>2</sup> See below, §§ 166-172.

<sup>3</sup> See, for instance, Hall, § 18, and Westlake, *Papers*, p. 268.

or not such acts may be styled 'crimes' is again only one of terminology; materially the rule is not at all controverted.<sup>1</sup>

§ 57a. The time-honoured distinction between members of the armed forces and civilians has been deeply affected by five developments which have appeared during and since the World War:

Modern Developments affecting the Distinction between Armed Forces and Civilians.

(1) *Growth of the number of combatants.*—While formerly wars were fought by relatively small forces composed of standing armies, modern warfare is waged with the help of large armed forces comprising, as a rule, the whole male population fit to carry arms. This applies not only to States in which conscription in peace time is followed by general mobilisation during the war, but also to States in which conscription is normally limited to time of war.

(2) *Growth of numbers of non-combatants engaged in war preparations.*—The fact of the vast increase of the number of combatants as well as the mechanisation of modern warfare results in a corresponding addition to the numbers of non-combatant men and women engaged in the manufacture of munitions and implements of war and generally in the rendering of services connected with military, naval, and air operations and preparations. In most countries legislation has been enacted which makes available the services, and to some extent the property, of the whole adult population for the purpose of the prosecution of the war.<sup>2</sup>

(3) *The development of aerial warfare.*—The fact that it

<sup>1</sup> See below, § 251, and Articles 20-26 of the *Instructions for the Government of Armies of the United States in the Field*, published in 1863 during the War of Secession.

<sup>2</sup> See the Opinion of Parker, Umpire, in *Christian Damson v. Germany* (United States and Germany: Mixed Claims Commission), *Annual Digest*, 1925-1926, Case No. 330, on the true test, in the light of the experience of the World War, of the distinction between the combatants and the civilian population. See the French Law of July 13, 1927, on the General Organisation of the Army providing for the conscription of the entire man-power. See on this Law

Vignal, *La loi . . . sur l'organisation générale de l'armée* (1929); Sirey, *Lois Annotées*, 1928, p. 1652. The French Law of July 11, 1938, on the general organisation of the nation for time of war is on the same lines: *J. Off.*, July 13, 1938, pp. 8330-8337. In April 1940 the Italian Cabinet approved a bill revising the existing legislation on the organisation and mobilisation of the nation for the time of war. It made subject to civilian mobilisation public and private bodies, citizens, including women, not liable to military service, and children above the age of thirteen years. The British Emergency Powers (Defence) Act, 1940, was no less comprehensive.

has been considered legitimate for aircraft to bombard, outside the theatre of war, munition factories, bridges, railway stations, and other objects of value for military communication and preparation, must necessarily tend to blur the distinction between members of the armed forces and civilians.<sup>1</sup>

(4) *Economic measures*.—To put economic pressure upon the enemy has always been legitimate; but, whereas previously it only played a secondary part, in modern warfare it has become of primary importance.<sup>2</sup> The consequence is that, although war still is in the main a contention between States by their armed forces, the civilian population nowadays is no longer immune from the hardships and privations of war.

(5) *The advent of totalitarian States*.—The spread of so-called totalitarian régimes operating under a political system in which the life and property of the individual are entirely dominated by the State both in time of peace and in war and utilised in a rigidly regimented fashion for the purposes of war economy has tended to accentuate the artificiality of the distinction, for many purposes, between the fighting forces and the civilian population.

However, while these factors have had the effect of blurring the established distinction in many respects and of necessitating a modification of some of the existing rules,<sup>3</sup> they have left intact the fundamental rule that non-combatants must not be made the object of direct attack by the armed forces of the enemy.

War a  
Contention  
between  
States for  
the purpose  
of over-  
powering  
each  
other.

§ 58. The last, and not the least important, characteristic of war is its purpose. It is a contention between States for the purpose of overpowering each other. This purpose of war is not to be confused with the ends<sup>4</sup> of war, for, whatever the ends of war may be, they can only be realised by one belligerent overpowering the other. Such a defeat as compels the vanquished to comply with any demand the victor may choose to make is the purpose of war.<sup>5</sup> Victory is necessary in order to overpower the enemy; and it is this

<sup>1</sup> See below, §§ 214e-214g.

<sup>2</sup> See Spaight, *Commerce*, pp. 1-21 and 73-87, on the growing importance of the economic weapon.

<sup>3</sup> See, e.g., below, 214e.

<sup>4</sup> See below, § 66.

<sup>5</sup> See Spaight, *Air*, pp. 2-6, on the theme that 'a war is fought in order to bring about a change of mind in another State'; and Spaight, *Commerce*, p. 8.

necessity which has been invoked as justifying all the horrors of war, the sacrifice of human life and health, and the destruction of property and devastation of territory. Apart from restrictions imposed by the Law of Nations upon belligerents, all kinds and all degrees of force may be used in war, in order that its purpose may be achieved.

§ 59. These characteristics of war must help to decide Civil War. whether so-called civil wars are war in the technical meaning of the term. It has already been stated<sup>1</sup> that an armed contention between a Federal State and its member-States ought to be considered as war because both parties are real States, although the Federal State may correctly designate it as rebellion.<sup>2</sup> Such armed contentions may be called civil wars in a wider sense of the term. In the proper sense of the term a civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State, or when a large portion of the population of a State rises in arms against the legitimate Government. As war is an armed contention between *States*, such a civil war need not be war from the beginning, nor become war at all, in the technical sense of the term. But it may become war through the recognition of each of the contending parties, or of the insurgents, as a belligerent Power.<sup>3</sup> Through such recognition a body of individuals receives an international position, in so far as it is for some parts, and in some points, treated as though it were a subject<sup>4</sup> of International Law. Such recognition may be granted by the lawful Government, and then other States will in most cases, although they need not, likewise recognise a state of war as existing and assume the duties of neutrality. But it may happen that other States recognise insurgents as a belligerent Power before the State on whose territory the insurrection broke out so recognises them. In such a case the insurrection is war in the eyes of these other States, but not in the eyes of the legitimate Government.<sup>5</sup>

<sup>1</sup> See above, § 56.

<sup>2</sup> As to insurrection in mandated territories see Wright, *The Bombardment of Damascus*, in *A.J.*, xx. (1926) pp. 263-280.

<sup>3</sup> See below, §§ 76, 298.

<sup>4</sup> See above, vol. i. § 63.

<sup>5</sup> See below, § 298.

Guerilla  
War.

§ 60. The characteristics of war also determine whether so-called guerilla war is real war in the technical sense of the term.<sup>1</sup>

## II

### CAUSES, KINDS, AND ENDS OF WAR

Grotius, i. c. 3; ii. c. 1, c. 22, and c. 23; iii. c. 3—Pufendorf, viii. c. 6, § 9—Vattel, iii. §§ 2, 5, 24-50, 183-187—Lorimer, ii. pp. 24-49—Phillimore, iii. §§ 33-48—Twiss, ii. §§ 26-30—Halleck, i. pp. 488-520—Taylor, §§ 452-454—Wheaton, §§ 295-296—Hershey, Nos. 329-336—Stowell, pp. 413-424—Bluntschli, §§ 515-520—Heffter, § 113—Lueder in *Holtzendorff*, iv. pp. 221-236—Klüber, §§ 41, 235, 237—G. F. Martens, §§ 265-266—Ullmann, § 166—Fauchille, §§ 1001-1005 (2)—Despagnet, No. 506—Pradier-Fodéré, vi. Nos. 2661-2670—Rivier, ii. p. 219—Nys, iii. pp. 13-23—Calvo, iv. §§ 1866-1896—Kohler, § 70—Rolin, §§ 145-168—Balladore Pallieri, pp. 30-50—Rettich, *Zur Theorie und Geschichte des Rechts zum Kriege* (1888), pp. 141-291—Peyronnard, *Des causes de la guerre* (1901)—Wright, *The Causes of War and the Conditions of Peace* (1935)—Ballis, *The Legal Position of War* (1937)—Briere, *Le Droit de juste guerre* (1938)—Rundstein in *R.I.*, 3rd ser., xix. (1938) pp. 776-790—Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (1938), pp. 37-52—Kelsen in *Z.ö.R.*, xii. (1932) pp. 579-608—Rutgers in *Hague Recueil*, 1931 (iv.), pp. 7-60. See also some of the more recent literature noted above, § 53, and below, § 63.

Rules of  
Warfare  
and the  
Legality  
of War.

§ 61. Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause,<sup>2</sup> the same rules of International Law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral States. This is so, even if the declaration of war is *ipso facto* a violation of International Law, as when a belligerent declares war upon a neutral State for refusing passage to its troops, or when a State goes to war in patent violation of its obligations under the Covenant of the League or of the General Treaty for the Renunciation of War. To say<sup>3</sup> that, because such a declaration of war is *ipso facto* a violation of International

<sup>1</sup> For details see fourth edition.

<sup>2</sup> See below, § 63.

<sup>3</sup> See Ch. de Visscher in the *Grotius Society*, ii. p. 101, and in *Belgium's Case* (1916), p. 148; Bassompierre

in *R.I.*, 3rd ser., iv. (1923) pp. 236-246, concurs in the view expressed in the text. See also above, § 52. And see Kunz in *R.G.*, xli. (1934) pp. 43-52.

Law, it is 'inoperative in law and without any judicial significance,' is erroneous. The rules of International Law apply to war *from whatever cause it originates.*

§ 62. The causes of war are innumerable.<sup>1</sup> They are Causes of War. involved in the fact that the development of mankind has been intimately connected with the national development of States. A constant increase of population<sup>2</sup> must, if unchecked or deliberately encouraged, in the end force upon a State the necessity of acquiring more territory; and if it cannot be acquired by peaceable means, acquisition by conquest alone remains if International Law fails to provide means of peaceful change in accordance with justice. The cause of national unity and independence, rivalry between two or more States, the awakening of national ambition, the attempt to spread religious or political creeds, the craving for rich colonies and sources of new materials, the desire of a land-locked State for a sea-coast, the endeavour of a hitherto minor State to become a world-Power, and innumerable other factors, have been at work, ever since history was first recorded, in creating causes of war, and

<sup>1</sup> A mass of literature upon the causes of the World War and the responsibility for its outbreak is accumulating. The following is a short section:—in English: Grey, *Twenty-five Years, 1892-1916* (1925); Lowes Dickinson, *The International Anarchy, 1900-1914* (1926); Fabre-Luce, *The Limitations of Victory* (1926) (translated from the French), pp. 17-243; Fauchille, § 145 and bibliography in note (1) on p. 117; Mérygnac et Lémonon, i. pp. 5-53; Bourgeois et Pages, *Les origines et les responsabilités de la grande guerre* (1921). In German: Liszt, § 4, A (with bibliography); *Die grosse Politik der europäischen Kabinette, 1871-1914* (edited by Lepsius, Mendelssohn-Bartholdy, and Thimme); Montgelas, *Leitfaden zur Kriegsschuldfrage* (1923); *Die Kriegsschuldfrage Monatschrift für internationale Aufklärung* (a monthly periodical beginning in July 1923); *Die Kriegsschuldfrage: Ein Verzeichniss der Literatur des In- und Auslandes* (1925); and, with reference to Article 231 of the Treaty of Versailles, Wright in *A.J.*, xix. (1925)

pp. 83-86. See also Gooch, *Recent Revelations of European Diplomacy* (1927) (a survey of post-war literature); *British Documents on the Origins of the War, 1898-1914*, edited by Gooch and Temperley; Knubben in *Strupp, Wört.*, iii. pp. 334-443; Ewart, *The Roots and Causes of War*, 2 vols. (1925); Barnes, *The Genesis of the World War* (1926); Vermeil, *Les origines de la guerre* (1926); Seton-Watson, *Serajevo, A Study in the Origins of the Great War* (1926); Renouvin, *The Immediate Origins of War* (translation from French, 1928); Cohn, *Kriegsverhütung und Schuldfrage* (1931); Kunz, *Die Revision der Pariser Friedensverträge* (1932), pp. 164-190; Wegerer, *Bibliographie zur Vorgeschichte des Weltkrieges* (1934); Rogge in *Z.I.*, 50 (1935), pp. 208-314. On the origins of the war of 1939 see Cmd. 6102 and 6106, the French Yellow Book (available in an English translation) and the German and Polish White Books.

<sup>2</sup> See Wright, *Population and Peace* (1939).



likewise play their part in our own times.<sup>1</sup> Statesmen and Governments are not yet prepared to proceed on the view that, as within the State, there must exist avenues for effecting changes in existing rights by way not of force but of legislative action of the international community. Neither are they prepared to act on the view that, pending the constitution of such machinery and the adoption of such changes, the observance and collective enforcement of the law interpreted and applied by tribunals endowed with obligatory jurisdiction are more conducive to justice and true national welfare than the arbitrament of force.<sup>2</sup>

Justice of  
Causes of  
War.

§§ 63 and 64. It often depends upon the standpoint from which they are viewed whether or no causes of war are to be called just causes. A war may be just or unjust from the standpoint of both belligerents, or just from the standpoint of one and utterly unjust from the standpoint of the other. The assertion that whereas all wars waged for political causes are unjust, all wars waged on account of international delinquencies are just, if there be no other way of getting reparation and satisfaction, is certainly incorrect, because too sweeping. However, so long as war was a recognised instrument of national policy both for giving effect to existing rights and for changing the law, the justice

<sup>1</sup> Of these various factors making for war the economic causes of war have recently been given much prominence. See Woolf, *Economic Imperialism* (1920); Donaldson, *International Economic Relations* (1925); Moon, *Imperialism and World Politics* (1926); Culbertson, *International Economic Politics* (1929); Buell, *International Relations* (2nd ed., 1929), chap. v.; Hawtrey, *Economic Aspects of Sovereignty* (1930), pp. 105-129; Richardson, *Economic Disarmament* (1931); *The Causes of War* (a collection of addresses by Sir Arthur Salter and others. Published by Macmillan and Co., 1932); Salter in *Problems of Peace*, iii. (1929) pp. 75-93; Burns, *ibid.*, iv. (1930) pp. 86-110; Siegfried, *ibid.*, v. (1931) pp. 91-111; Dulles, *War, Peace and Change* (1939); Robbins, *The Economic Causes of War* (1939). It is submitted that while

conflicts of economic interests are a most important cause of international friction, it is inaccurate to regard them as an inevitable cause of wars. Economic conflicts within the State do not normally bring about civil war and a resulting suspension of the rule of law. They take place and receive a solution within the orbit of the law. In the international society the principal causes of war lie in the imperfection of international organisation as yet unable, on the one hand, to impose the general duty of obligatory judicial settlement and to restrain effectively recourse to force in violation of existing obligations, and, on the other hand, to provide a working machinery for peaceful change of the existing law.

<sup>2</sup> Such as the Covenant of the League of Nations has endeavoured to set up. See above, §§ 25b-25g.

or otherwise of the causes of war was not of legal relevance. The right of war, for whatever purposes, was a prerogative of national sovereignty. Thus conceived, every war was just. The legal position has now changed with the limitation of the right of war in the Covenant of the League and with its abolition as an instrument of national policy in the General Treaty for the Renunciation of War.<sup>1</sup> As before, International Law is not concerned with the merits of the controversies giving rise to war. But for many legal purposes it seems now again possible to distinguish between just and unjust (or lawful and unlawful) wars—the latter being those waged in breach of the obligations of the Covenant and of the Treaty for the Renunciation of War.<sup>2</sup>

<sup>1</sup> See above, §§ 52*h* et seq.

<sup>2</sup> For this reason, although the justice of the cause of a particular war is irrelevant so far as concerns the actual rules of war applicable to its conduct, there is a tendency for the cause of the war thus interpreted to become important (i) during the war, in influencing the attitude of neutral States (see § 292*i*), and (ii) at the close of the war, in any attempt that may be made to determine the responsibility for the war. There has accordingly been a revival of the attempts to distinguish between just and unjust causes of war, particularly in regard to the Grotian conception of the duty to intervene in a war when justice is at stake. For the older attempts see Grotius, ii. c. 22, c. 23, c. 24, c. 25, c. 26; Victoria, *De Jure Belli*, §§ 13, 14; Pufendorf, viii. 6, 5; Salvioli, *Il concetto della guerra giusta negli scrittori anteriori a Grozio* (1915); Pillet, *La guerre et le droit* (1922), pp. 9-31; Vanderpol, *La doctrine scholastique du droit de guerre* (1919), pp. 51-69 and 160-285; Holdsworth, *History of English Law*, v. (1924) pp. 25-33 (upon the early Christian and medieval discussion of the legality of war and the difference between a just and an unjust war); Trelles in *Hague Recueil*, 1927 (ii.), pp. 249-298; Butler and Maccoby, *The Development of International Law* (1928), pp. 107-120; Holland, *Lectures*, pp. 249-251; Beaufort, *La guerre comme instrument de secours ou de punition* (1933); Scott, *The Spanish*

*Origin of International Law. Francisco de Vitoria and his Law of Nations* (1934), pp. 173-230; Regout, *La doctrine de la guerre juste de Saint Augustin à nos jours d'après les théologiens et les canonistes catholiques* (1935); Eppstein, *The Catholic Tradition of the Law of Nations* (1935), pp. 65-148; Kipp, *Moderne Probleme des Kriegrechts in der Spätscholastik* (1936); Kusters in *R.I.*, 3rd ser., xiv. (1933), pp. 634-676 (as to St. Augustin). For the new attempts, Woltzendorff, *Die Lüge des Völkerrechts* (1919); Strisower, *Der Krieg und die Völkerrechtsordnung* (1919), pp. 41-68 and 128-142; Le Fur in *R.G.*, xxvi. (1919) pp. 9-75 and 268-309; van Vollenhoven, *The Three Stages of International Law* (1919); Jitta, *La rénovation du droit international* (1919), pp. 175-177; Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 174-184, and *Völkermord oder Völkerbund* (1920), pp. 39-51; Woltzendorff, *Der Krieg als Rechtsinstitut* (1920); Breschi, *La dottrina della guerra nel diritto internazionale* (1922); Rolin, §§ 145-148; Struycken in *Bibl. Visser*, i. (1923) pp. 102-107; Fischer Williams in the *International Law Association's Thirty-fifth Report* (1924), pp. 439-441; Blum, *Das System der verbotenen und erlaubten Kriege in Völkerbundsatzung, Locarno-Verträgen und Kellogg-Pakt* (1932); Verdross in *Hague Recueil*, 1929 (v.), pp. 496-503; Rutgers, *ibid.*, 1931 (iv.), pp. 7-60; von Elbe in *A.J.*, xxxiii. (1939) pp. 665-688 (a general survey). In the

Different  
Kinds of  
War.

§ 65. Writers on International Law who lay great stress upon the causes of war in general, and upon the distinction between just causes and others, also lay great stress upon the distinction between different kinds of war. But as the rules of the Law of Nations are the same<sup>1</sup> for the different kinds of war that may be distinguished, this distinction is in most cases of no importance.

Ends of  
War.

§ 66. The cause, or causes, of a war determine at its inception the ends of that war. The ends of war must not be confounded with the purpose of war.<sup>2</sup> Whereas the purpose is always the same—namely, the overpowering and utter defeat of the opponent—the ends may be different in each case. Ends of war are those objects for the realisation of which a war is made.<sup>3</sup> In the beginning of the war its ends are determined by its cause or causes, as already said. But they may undergo alteration, or at least modification, with its progress and development. Apart from specific treaty obligations, no moral or legal duty exists for a belligerent to stop the war when his opponent is ready to concede the object for which war was made.<sup>4</sup>

### III

#### THE LAWS OF WAR

Hall, § 17—Westlake, ii. pp. 56-63, and *Papers*, pp. 237-241—Maine, pp. 123-159—Phillimore, iii. § 50—Taylor, § 470—Hershey, No. 336—Walker, *History*, i. §§ 106-108—Heffter, § 119—Lueder in *Holtzendorff*, iv. pp. 253-332—Ullmann, §§ 167, 170—Fauchille, § 1006-1113 (1)—Despagnet, Nos. 508-510—Pradier-Fodéré, vii. Nos. 3212-3213—Mérignhac, iii<sup>a</sup>. pp. 19-44—Rivier, ii. pp. 238-242—Nys, iii. pp. 91-96—Calvo, iv. §§ 1897-1898—Fiore, iii. Nos. 1244-1260—Martens, ii. § 107—Longuet, p. 12—Bordwell, pp. 100-

older literature the expression *justum bellum*, which means regular war (cf. *justae nuptiae*), is apt to be confused with *justa causa*, a just cause of war (see Westlake, ii. pp. 2-3, who draws attention to this point, and Koster in *R.I.*, 3rd ser., xiv. (1933) pp. 634-636).

<sup>1</sup> See above, § 61.

<sup>2</sup> Ends of war must likewise not be confounded with aims of land and sea warfare; see below, §§ 103, 173.

<sup>3</sup> See Bluntschli, § 536; Leuder in *Holtzendorff*, iv. p. 364; Rivier, ii. p. 219.

<sup>4</sup> Contrast with this the Resolution of the Institute of International Law adopted in 1934 in the matter of reprisals, where it is suggested, *inter alia*, that the State resorting to reprisals must 'ne pas détourner les représailles du but qui en a déterminé initialement l'usage': see *R.I.*, 3rd ser., xv. (1934) p. 745.

193—Spaight, *Land*, pp. 1-19—Garner, i. §§ 1-24—Liszt, § 566—Rolin, §§ 1-50—Hyde, ii. § 655—Balladore Pallieri, pp. 113-145—Kunz, pp. 11-24—Leonard, *Der Einfluss der römischen Rechtsgeschichte auf die Kriegsgebrauche der Gegenwart* (1916)—Holdsworth, *History of English Law*, v. (1924) pp. 33-34—*Kriegsbrauch*, p. 2—*Land Warfare*, §§ 1-7—Holland, *Studies*, pp. 40-96—Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 3-25—Jerusalem, *Kriegsrecht und Kodifikation* (1918)—Moore, *Current Illusions* (1924), pp. 1-39—König in *Z.V.*, xi. (1918-1920) pp. 155-189—Dickinson, *The New Law of Nations*, in *West Virginia Law Quarterly*, xxxii. (1925) pp. 4-32—La Pradelle in *R.I. (Paris)*, xii. (1933) pp. 511-522—Kunz in *R.G.*, xli. (1934) pp. 43-52—Garner in *R.I.*, 3rd ser., xvii. (1936) pp. 96-117, and in *Grotius Society*, xxii. (1937) pp. 1-10.

§ 67. Laws of war are the rules of the Law of Nations Origin of  
the Laws  
of War. respecting warfare. The roots of the present laws of war are to be traced back to practices of belligerents which arose, and grew gradually, during the latter part of the Middle Ages. The unsparing cruelty of the war practices during the greater part of the Middle Ages began gradually to be modified through the influence of Christianity<sup>1</sup> and chivalry; and although these practices were cruel enough during the fifteenth, sixteenth, and seventeenth centuries, they were mild compared with those of still earlier times. Decided progress was made during the eighteenth century, and again after the close of the Napoleonic wars, especially in the years from 1850 to the outbreak of the World War. The laws of war evolved in this way: isolated milder practices by and by became usages, so-called *usus in bello*, manner of warfare, *Kriegs-Manier*, and these usages through custom and treaties became legal rules. And this evolution is constantly going on, for, besides the recognised laws of war, there are usages in existence which have a tendency to become gradually legal rules of warfare. The whole growth of the laws and usages of war is determined by three principles. There is, first, the principle that a belligerent should be justified in applying any amount and any kind of force which is necessary for the realisation of the purpose of war—namely, the overpowering of the opponent. There is, secondly, the principle of humanity at work, which says that all such kinds and degrees of violence as are not necessary for the overpowering of the opponent should not be per-

<sup>1</sup> On the Islamic Laws of War see Rechid in *Hague Recueil*, 60 (1937) (ii.), pp. 402-502.

mitted to a belligerent. And, thirdly and lastly, there is at work the principle of chivalry, which arose in the Middle Ages, and introduced a certain amount of fairness in offence and defence, and a certain mutual respect. In contradistinction to the savage cruelty of former times, belligerents gradually adopted the view that the realisation of the purpose of war was in no way hampered by indulgence shown to the wounded, to prisoners, and to private individuals who do not take part in the fighting.<sup>1</sup>

The most important Developments of the Laws of War.

§ 68. The most important developments<sup>2</sup> of the laws of war took place through the following general treaties concluded between the majority of States after 1850:

(1) The Declaration of Paris of April 16, 1856, respecting warfare on sea. It abolished privateering, recognised the principles that the neutral flag protects non-contraband enemy goods, and that non-contraband neutral goods under an enemy flag cannot be seized, and enacted the rule that a blockade in order to be binding must be effective. The Declaration was signed by seven States, but almost all other maritime Powers acceded in course of time.<sup>3</sup>

(2) The Geneva Convention of August 22, 1864, for the amelioration of the condition of wounded soldiers in armies in the field, which was originally signed by only nine States, but to which in course of time almost all the civilised States acceded. A new Geneva Convention was signed on July 6, 1906, by thirty-five States, and several others acceded. Its principles were adapted to maritime warfare by conventions<sup>4</sup> of the First and Second Hague Peace Conferences.

(3) The Declaration of St. Petersburg of December 11, 1868, respecting the prohibition of the use in war of projectiles under 400 grammes (14 ounces) which are either explosive or charged with inflammable substances. It was signed by seventeen States.

(4) The Convention enacting regulations respecting the Laws of War on Land agreed upon at the First Peace Conference of 1899. *Hague*

<sup>1</sup> See above, § 57.

<sup>2</sup> For an estimate of the influence exercised by the Hague Conventions upon wars since 1899 see Garner,

*Developments*, pp. 189-396.

<sup>3</sup> See above, vol. i. § 47, and below, § 177, and Garner, i. § 11.

<sup>4</sup> See below, § 204.

The history of this last-mentioned Convention may be traced back to the *Instructions for the Government of Armies of the United States in the Field* which the United States published on April 24, 1863, during the War of Secession. These instructions, which were drafted by Professor Francis Lieber,<sup>1</sup> of the Columbia College of New York, represented the first endeavour to codify the laws of war, and they are even nowadays of great value and importance. It was not, however, until the Hague Peace Conference of 1899 that the Powers reassembled to discuss again the codification of the laws of war. The Conference adopted a Convention which was subsequently ratified by most of the participants, only a few Powers abstaining from ratification.<sup>2</sup>

The Second Peace Conference of 1907 revised this Convention, and its place is now taken by Convention IV. of the Second Peace Conference. Convention IV.,<sup>3</sup> as the Preamble expressly states, does not aim at giving a complete code of the laws of war on land, and cases beyond

<sup>1</sup> See Root in *A.J.*, vii. (1913) pp. 453-469.

<sup>2</sup> As to 'Brussels Declarations' and the Manual adopted by the Institute of International Law in 1880 see *Annuaire*, v. pp. 157-174.

<sup>3</sup> For brevity Convention IV. will be referred to in the following pages as the *Hague Regulations*. These Regulations, although they are intended to be binding upon the belligerents, are only the basis upon which the signatory Powers have to frame instructions for their forces. Article 1 declares: 'The High Contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land annexed to the present Convention.' The British War Office, therefore, published in 1912 a guide, *Land Warfare: an Exposition of the Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army*, written by order of the Secretary of State for War by Colonel Edmonds and Professor Oppenheim. In it the Hague Regulations are systematically set out, and their full text is published in an Appendix.

This guide was in 1914 embodied in a new edition of the official *Manual of Military Law*. The British War Office had already in 1903 published a manual, drafted by Professor Holland, for the information of the British forces, comprising 'The Laws and Customs of War on Land, as defined by the Hague Convention of 1899.' See also Holland, *The Laws of War on Land (Written and Unwritten)* (1908). Germany had in 1902 issued for the guidance of officers *Kriegsbrauch im Landkriege*. Before the outbreak of the World War many other States had issued manuals: e.g. the French *Les lois de la guerre continentale* (4th ed., 1913), and the United States *Rules of Land Warfare* (1914). See details in Garner, i. §§ 3-6. In March 1934 France promulgated instructions concerning sea warfare. For the text see *Bulletin officiel de la Marine*, 1934, No. 14, p. 157. For comment see von Stauffenberg in *Z.ö.V.*, viii. (1938) pp. 22-47. See also Genet, ii. pp. 624-626. In July 1938 Italy issued her war and neutrality regulations. For text and comment by Verdross see *Z.ö.R.*, xix. (1939) pp. 193-315. See also Steiner in *A.J.*, xxxiii. (1939) pp. 151-157.

its scope still remain the subject of customary rules and usages. Moreover, Article 2 of the Convention contains the so-called 'general participation clause'<sup>1</sup>: it expressly stipulates that the Regulations shall be binding upon the contracting Powers only in case of war between two or more of them, and shall cease to be binding in case a non-contracting Power takes part in the war.<sup>2</sup>

(5) The Hague Declaration concerning expanding (dumdum) bullets.<sup>3</sup>

(6) The Hague Declaration concerning projectiles and explosives launched from balloons.<sup>4</sup>

(7) The Hague Declaration concerning projectiles diffusing asphyxiating or deleterious gases.<sup>5</sup>

(8) The Hague Convention for the adaptation to sea warfare of the principles of the Geneva Convention, produced by the First and revised by the Second Peace Conference.<sup>6</sup>

(9) The Hague Convention of 1907 concerning the opening of hostilities.<sup>7</sup>

(10) The Hague Convention of 1907 concerning the status of enemy merchantmen at the outbreak of hostilities.<sup>8</sup>

(11) The Hague Convention of 1907 concerning the conversion of merchantmen into men-of-war.<sup>9</sup>

(12) The Hague Convention of 1907 concerning the laying of automatic submarine contact mines.<sup>10</sup>

(13) The Hague Convention of 1907 concerning bombardment by naval forces in time of war.<sup>11</sup>

(14) The Hague Convention of 1907 concerning certain restrictions on the exercise of the right of capture in maritime war.<sup>12</sup>

<sup>1</sup> See below, § 69a.

<sup>2</sup> When the World War came, this Convention had not been ratified by all the belligerents, and its binding force was controversial. Garner, i. §§ 16-18, maintains that the corresponding Convention of 1899, which had been so ratified, was binding, but that the Convention of 1907 was not binding, except in so far as it was declaratory of existing customary rules.

<sup>3</sup> See below, § 112.

<sup>4</sup> See below, § 114.

<sup>5</sup> See below, § 113.

<sup>6</sup> See below, § 204.

<sup>7</sup> See below, § 94.

<sup>8</sup> See below, § 102a. This Convention was denounced by Great Britain on November 14, 1925: see Cmd. 2564 of 1925.

<sup>9</sup> See below, § 84.

<sup>10</sup> See below, § 182a.

<sup>11</sup> See below, § 213.

<sup>12</sup> See below, §§ 85, 186, 187, 191.

(15) The two Hague Conventions of 1907<sup>1</sup> concerning the rights and duties of neutral Powers and persons in land warfare and in sea warfare.<sup>2</sup>

Of the developments subsequent to the World War the following may be noted :

(1) The Protocol of 1925 concerning the use in war of asphyxiating, poisonous, and other gases.<sup>3</sup>

(2) The Geneva Conventions of 1929 concerning the treatment of sick and wounded<sup>4</sup> and of prisoners of war.<sup>5</sup>

(3) The London Protocol of 1936 relating to the use of submarines against merchant vessels.<sup>6, 7</sup>

§ 69. As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals<sup>8</sup> as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his other subjects. In accordance with the German

Binding  
Force of  
the Laws  
of War.

<sup>1</sup> See below, § 292.

<sup>2</sup> See Hudson in *A.J.*, xxv. (1931) pp. 114-117, for a useful survey of the status, in 1930, of the Hague Conventions of 1899 and 1907. And see Appendix, p. 739, below, on the position in 1940. As to the Declaration of London of 1909 see below, § 292.

<sup>3</sup> See below, § 113.

<sup>4</sup> See below, § 118.

<sup>5</sup> See below, § 125.

<sup>6</sup> See below, § 194a.

<sup>7</sup> For the Convention on Maritime Neutrality adopted on February 20, 1928, by the Sixth International Conference of American States at Habana see *A.J.*, xxvi. (1932), Suppl., p. 151; Hudson, *International Legislation*, iv. p. 2401. For comment on this Convention see Alvarez, *Le Panaméricanisme et le Sixième Conférence Panaméricaine* (1928), pp. 168 *et seq.*; Garner in *A.J.*, xxvi. (1932) pp. 574-579; and Sandiford in *Rivista*, xx. (1928) pp. 203-210. The United States of America ratified this Convention in March 1932. See also Wright in *A.J.*, xxi. (1927) pp. 127-137, for comment on the project of the American Institute of International Law on Maritime Neutrality. And see the draft by Alvarez of a Convention on

Maritime Neutrality adopted in 1917 by the American Institute of International Law : *Acte final de la Session de la Havana* (1917), pp. 79-99. Of some importance are also the Scandinavian Rules of Neutrality adopted in 1938 by Sweden, Norway, Finland, Denmark, and Iceland. These Rules were issued separately by each of these States in pursuance of an understanding arrived at on May 27, 1938. It was agreed that they should not be changed without prior consultation. For the texts of the declaration of May 27, 1938, and the practically identical Rules see *Acta Scandinavica*, ix. (1938) pp. 123-127; *A.J.*, xxxii. (1938), Suppl., pp. 141-163; *Z.ö.V.*, viii. (1938) pp. 522-541; *Z.ö.R.*, xix. (1939) pp. 59-77; Genet, ii. pp. 696-704; and, in particular, Deak and Jessup, *Collection of Neutrality Laws, Regulations, and Treaties of Various Countries* (1939), pp. 479-483 (Danish Rules). For comment on the Scandinavian Neutrality Rules see Hambro in *Z.ö.V.*, viii. (1938) pp. 445-469; Padelford in *A.J.*, xxxii. (1938) pp. 789-793; Verdross in *Z.ö.R.*, xix. (1939) pp. 44-59. See also above, p. 181, as to municipal enactments.

<sup>8</sup> See below, § 248.



proverb, *Kriegsraeson geht vor Kriegsmanier* (*necessity in war overrules the manner of warfare*), many German authors<sup>1</sup> before the World War were already maintaining that the laws of war lose their binding force in case of extreme necessity. Such a case was said to arise when violation of the laws of war alone offers, either a means of escape from extreme danger, or the realisation of the purpose of war—namely, the overpowering of the opponent. This alleged exception to the binding force of the laws of war was, however, not at all generally accepted by German writers; for instance, Bluntschli did not mention it. English, American, French, and Italian writers did not, it appears, acknowledge it. The protest of Westlake<sup>2</sup> against it was the more justified as a great danger would have been involved in its admission.

The proverb dates very far back in the history of warfare. It originated and found recognition in those times when warfare was not regulated by laws of war, *i.e.* generally binding customs and international treaties, but only by usages (*Manier*, *i.e.* *Brauch*), and it says that necessity in war overrules usages of warfare. In our days, however, warfare is no longer regulated by usages only, but to a greater extent by laws—firm rules recognised either by international treaties or by general custom.<sup>3</sup> These conventional and customary rules cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of

<sup>1</sup> See, for instance, Lueder in *Holtzendorff*, iv. pp. 254-257; Ullmann, § 170; Meurer, ii. pp. 7-15. Liszt, who in former editions agreed with these writers, deserted their ranks in the sixth edition (§ 24, iv. 3), and correctly took the other side; see twelfth edition by Fleischmann, § 35, iv., and § 56, ii. See also Nys, iii. p. 202; Holland, *War*, § 2, where the older literature is quoted: Cybichowski, *Studien zum internationalen Recht* (1912), pp. 21-71; Lammasch, *op. cit.*, pp. 20-23; Kunz, pp. 26-28; Schoen, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen* (1917), pp. 112-118; Nys, *L'occupation de guerre* (1919), pp. 92-110; Rivier, ii. p. 242; Borsi,

*Ragione di guerra a stato di necessità nel diritto internazionale* (1916); Cavaglieri, *Lo stato di necessità nel diritto internazionale* (1917), pp. 97-102; Strisower, *Der Krieg und die Völkerrechtsordnung* (1919), pp. 85-108; Rolin, §§ 11-50; Strupp, *Das völkerrechtliche Delikt* (1920), pp. 172-179; Huber in *Z.V.*, vii. (1913) pp. 351-374; Visscher in *R.G.*, xxiv. (1917) pp. 74-108; Kaeckenbeck in *Grotius Society*, iv. (1919) pp. 229-230; de Visscher in *Bibl. Visser.*, ii. (1924) p. 113.

<sup>2</sup> See Westlake, ii. pp. 126-128, and *Papers*, p. 243.

<sup>3</sup> Concerning the distinction between usage and custom, see above, vol. i. § 17.

necessity in self-preservation. Thus, for instance, the rules that poisoned arms and poison are forbidden, and that it is not allowed treacherously to kill or wound individuals belonging to the hostile army, do not lose their binding force even if their breach would effect an escape from extreme danger or the realisation of the purpose of war. Article 22 of the Hague Regulations stipulates distinctly that the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in a case of necessity. What may be ignored in case of military necessity are not the laws of war, but only the usages of war.<sup>1</sup>

§ 69a. The effectiveness of some of the Hague Conventions concluded before the World War was considerably impaired by the incorporation of a so-called 'general participation clause' providing that the Convention shall be binding only if all the belligerents are parties to it. The effect of the clause was, in strict law, to deprive some of the Conventions of their binding force either from the beginning of the War or in the course of it as soon as a non-signatory State, however insignificant, joined the ranks of the belligerents.<sup>2</sup> In some such cases British courts declined to treat a Con-

General  
Partici-  
pation  
Clause.

<sup>1</sup> For here the general rule that necessity in the interest of self-preservation is an excuse for an illegal act is not applicable, because in the Preamble of Hague Convention IV. it is expressly stated that the rules of warfare were framed with regard to military necessities. 'According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war as far as military requirements permit, are intended to serve as a general rule of conduct for belligerents in their mutual relations and in their relations with the inhabitants.' In other words, military necessity has already been discounted in the drawing up of the rules. Moreover, some of the conventional rules regulating warfare are actually qualified by express reference to military necessity; for instance, Article 23 (g) of the Hague Regulations and Article 15 of the

Geneva Convention of 1906. See also Oppenheim, *The Future of International Law*, § 71. The German *Reichsgericht*, in cases decided in 1922 and 1924, relied on the doctrine of self-preservation as authorising departures from the Hague Regulations. See *German Requisitions case*, *Annual Digest*, 1919-1922, Case No. 296; *Requisitions (Germany) case*, *ibid.*, 1923-1924, Case No. 230.

<sup>2</sup> See Garner, §§ 16-18; Des Gouttes, *La Convention de Genève de 1929* (1930), pp. 187-189; Rasmussen, *Code des prisonniers de guerre* (1931), pp. 69-71, who points out that the Convention of 1899 concerning the laws and customs of war was binding only till August 1917, when Liberia (who was not a party to the Convention) became a belligerent. See also, generally, Zittelmann in *Archiv des öffentlichen Rechts*, xxxv. (1915) pp. 1-27; Strupp, *Wört.*, i. pp. 31, 32; and Hyde, ii. § 596.

vention as invalid on this ground<sup>1</sup>; in others most of the substantive provisions of the Conventions were operative inasmuch as they embody rules of customary International Law.<sup>2</sup> But obviously the clause was in law largely destructive of the professed object of the Conventions, and its removal or modification by a special declaration must be regarded as deserving the serious attention of Governments. The two important humanitarian Conventions concluded after the World War—the Conventions of 1929 relating to the treatment of sick and wounded and of prisoners of war—expressly reject the general participation clause.<sup>3</sup> On the other hand, the clause in question threatens to reappear in a modified form. Thus various States, including Great Britain, who have ratified the Protocol of 1925 concerning the use of asphyxiating, poisonous, and other gases,<sup>4</sup> have appended a reservation to the effect that the Protocol shall cease to be binding towards any belligerent Power whose armed forces, *or the armed forces of whose Allies*, fail to respect the prohibitions laid down in the Protocol. The effect might be that in a war in which a considerable number of belligerents are involved, the action of one State, however small, in a distant region of war, might become the starting point for a general abandonment of the restraints of the Convention.<sup>5</sup> As between opposing belligerents actually in contact with one another some form of 'participation' clause is clearly necessary. But the requirements of reciprocity and of effectiveness of treaties are not irreconcilable, and progress can undoubtedly be achieved by a less rigid and exacting formulation of the clause than has been the case hitherto.

<sup>1</sup> See *The Möwe* [1915] P. at pp. 12, 13; 1 B. and C.P.C. at 70; *The Blonde and Other Ships* [1922] 1 A.C. at pp. 323, 324; 3 B. and C.P.C. at p. 1042 (where a 'quibbling interpretation of the Convention,' in the above sense, was rejected by Lord Sumner).

<sup>2</sup> See Des Gouttes, *op. cit.*, p. 188, who states that although the Geneva Convention of 1906 was not formally binding on account of the general participation clause, there was only

one isolated case of a State (Germany) availing itself of the exception.

<sup>3</sup> See below, §§ 124a and 130a.

<sup>4</sup> See below, § 113.

<sup>5</sup> Two other facts limiting the effectiveness of the rules of war may be mentioned: (1) the institution of reprisals which, while designed to ensure the observance of rules of war, can and have been used as a convenient cloak for disregarding the laws of war (see below, §§ 248, 249); (2) the question of the plea of superior command (see below, § 253).

## IV

## THE REGION OF WAR

Taylor, §§ 471, 498—Heffter, § 118—Lueder in *Holtzendorff*, iv. pp. 362-364—Klüber, § 242—Liszt, § 58, A—Ullmann, § 174—Pradier-Fodéré, vi. No. 2733, and viii. Nos. 3104-3106—Rivier, ii. pp. 216-219—Boeck, Nos. 214-230—Longuet, §§ 18-25—Perels, § 33—Rettich, *Zur Theorie und Geschichte des Rechts zum Kriege* (1888), pp. 174-213—Boeckner, *Der Kriegsschauplatz* (1911)—Schramm, § 6—Wehberg, § 3, p. 55—Suarez, §§ 346, 347—Balladore Pallieri, pp. 184-188—Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933), pp. 369-429.

§ 70. Region of war is that part of the surface of the earth in which the belligerents may prepare and execute hostilities against each other. In this meaning, 'region of war' ought to be distinguished from 'theatre of war.' The latter is those portions of land, sea, or air on or in which hostilities are actually taking place.<sup>1</sup> Legally no place which is not region of war may be made the theatre of war; but not every section of the whole region of war is necessarily theatre of war. Thus, in the war between Great Britain and the two South African Republics, the whole of the territory of the British Empire, including its territorial waters, and the open sea, as well as the territory of the Republics, was the region of war, but the theatre of war was in South Africa only. On the other hand, in the World War the theatre of war was almost coextensive with the region of war.

Region of  
War in  
contradistinction to  
Theatre  
of War.

<sup>1</sup> The distinction between 'region' and 'theatre' of war, although of considerable importance, does not appear to have formerly been made by any other writer. It becomes quite apparent from Article 39 of the Hague Regulations and Article 11 of Hague Convention V., where the 'theatre of war' (*théâtre de la guerre*) means that part of territory on which hostilities actually take place. See also Schramm, § 6, p. 58, and Wehberg, p. 59. In *Dominion Coal Co. v. Maskinonge Steamship Co.* (1916) 33 T.L.R. 132, 340; (1917) 34 T.L.R. 212, the question was of importance whether a vessel had been ordered by the charterers to trade 'in the war

region.' It is, however, obvious that the parties did not thereby mean the 'region of war' in the sense used above, but the 'theatre of war.' The distinction is particularly evident in relation to the open sea. For instance, the right of visit and capture may be exercised throughout this region of war; mines may only be laid on the theatre of war, that is, where actual fighting takes place. Therefore the region of war remains unaltered, but the theatre of war may shift about. Neutral territory on which hostilities are unlawfully taking place seems to come within the 'theatre of war.' See also *United States v. McDonald*, referred to below, p. 330, n. 1.

Particular  
Region of  
War.

§ 71. The region of war depends upon the belligerents. For this reason, every war has its particular region, so far, at any rate, as the territorial region is concerned. For besides the open sea,<sup>1</sup> and all such territories as are as yet not occupied by any State (which are always within the region of war), the particular region of every war is the whole of the territories and territorial waters of the belligerents. But any part of the globe which is permanently neutralised<sup>2</sup> is always outside the region of war.

Since colonies are a part of the territory of the empire or mother-country, they fall within the region of a war between the latter and another State, whatever their position may

<sup>1</sup> Can States, through a unilateral declaration, extend the width of their neutral maritime belt beyond three miles, and thereby curtail the region of war? By a decree of October 18, 1912, France claimed a maritime belt six miles wide for all purposes of neutrality. After the outbreak of the World War, Italy, when still neutral, by a decree of August 6, 1914, likewise claimed a neutral maritime belt six miles wide. Great Britain, as a matter of policy, ordered her cruisers to respect the six miles claimed by Italy. However, the decision of the German Prize Court in *The Elida*, Z.V., ix. (1915) p. 109, and the arrangement between the British and the Norwegian Governments that, for the decision of *The Loekken* (1918) 34 T.L.R. 594, the three-mile limit should be postulated, would seem to show that belligerents are not prepared to recognise the claim of any State to a neutral maritime belt more than three miles wide. In October 1939, representatives of twenty-one American States, including the United States, issued a Declaration laying down that 'as a measure of continental self-protection, the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent nation.' The Declaration (printed in *International*

*Conciliation*, January 1940, No. 356, p. 27, and in *A.J.*, xxxiv. (1940), Suppl., p. 17) laid down the wide geographical limits of the zone thus claimed. After the naval battle off Montevideo in December 1939, the American Republics addressed to Great Britain, France, and Germany a joint protest based on the above-mentioned Declaration. In that protest the crucial passage of the Declaration was reproduced as referring to the 'indisputable right' of the American Republics. Great Britain in her reply stated correctly that the Declaration, in so far as it implied a claim for the abandonment by the belligerents of their legitimate rights, had no basis in International Law and could not be imposed by unilateral action on the part of neutrals. In so far as the claim was based on the right to act in self-preservation, it is difficult to admit that it complied with the rigid requirements which International Law has adopted as permitting such action (see above, vol. i. § 130). For the protest and the British answer see *The Times* newspaper, January 16, 1940. In 1915 and 1916 the United States Government, while requesting the cessation of cruising and observation 'in close proximity to the territorial waters of the United States' (*U.S. For. Rel.*, 1915, Suppl., p. 879), admitted that their remonstrance was not based upon any assertion of illegality of such action (*ibid.*, 1916, Suppl., p. 763). See also *Harvard Research* (1939), pp. 343-353.

<sup>2</sup> See below, § 72.

be within it.<sup>1</sup> As States under the suzerainty of another State are internationally in several respects considered to be a portion of its territory,<sup>2</sup> they fall within the region of a war between it and another Power.<sup>3</sup> Such parts of the territory of a State as are under the *condominium*, or under the administration, of another State,<sup>4</sup> fall within the region of a war between one of the *condomini*, or the administering State, and another Power. Thus, in the World War, Cyprus at once fell within the region of war; so did the Soudan, which is under the *condominium* of Great Britain and Egypt. On the other hand, Cyprus would not have fallen<sup>5</sup> within the region of a war between Turkey and any other Power than Great Britain.

Although as a rule the territories and territorial waters of both belligerents, together with the open sea, fall within the region of war, and neutral territories do not, exceptions may occur:

(1) A belligerent can deliberately renounce its right to treat certain territories, or parts of the open sea, as being within the region of war, provided that such areas fulfil the

<sup>1</sup> On the question of 'automatic belligerency' of the British self-governing Dominions see vol. i. § 94b. See also Dewey, *The Dominions and Diplomacy*, ii. (1929) pp. 255 *et seq.*, 329 *et seq.*; *British Commonwealth Relations* (Proceedings of the Toronto Conference of 1933: edited by Toynbee, 1934), pp. 45, 46, 79-81, 123-125; *Round Table*, xviii. (1927-1928) pp. 647-653 (the attitude of South Africa); Keith, *The King and the Imperial Crown* (1936), pp. 444-447; Stewart, *Treaty Relations of the British Commonwealth of Nations* (1939), pp. 380-388. In September 1939 New Zealand, Australia, Canada, and South Africa, with varying degrees of independence of decision and on different dates, declared to regard themselves to be at war with Germany. Great Britain declared war on Germany on September 3, 1939. On the same day a state of war was proclaimed in Australia and New Zealand. The Prime Minister of the former announced that 'Great Britain has declared war, and that as a result Australia is also at war.'

The Government of New Zealand adopted the same view. The legislatures of the two countries subsequently endorsed the attitude taken up by their Governments. South Africa entered the war on September 6 as the result of the vote of the House of Assembly. Following upon the vote of the Canadian Parliament a Royal proclamation was issued on September 10 declaring the existence of a state of war between Canada and Germany as from that date. For a survey of these events see *Round Table*, No. 117 (1939), pp. 177-229. The Irish Free State announced its neutrality.

<sup>2</sup> See above, vol. i. §§ 91, 169.

<sup>3</sup> But the Ionian Islands, then a free and independent State under the protectorate of Great Britain, were not at war during the Crimean War (*Case of the Ionian Ships* (1855) 2 Spinks 219; Pitt Cobbett, *Leading Cases*, i. (1931) p. 50).

<sup>4</sup> See above, vol. i. § 171.

<sup>5</sup> Cyprus has since been annexed by Great Britain. See above, vol. i. § 50a.

duties incumbent upon neutrals. Thus, during the Turco-Italian War, in 1911 and 1912, Italy treated Crete and Egypt as though they were not parts of the region of war.<sup>1</sup>

(2) Cases are possible in which a part, or the whole, of the territory of a neutral State falls within the region of war. These cases arise in wars in which such neutral territories are the very objects of the war, as were Korea (then an independent State) and the Chinese province of Manchuria<sup>2</sup> in the Russo-Japanese War; or when a neutral State, either deliberately, or because it has not at its disposal sufficiently strong naval forces, does not prevent a belligerent from committing hostilities in its territorial waters and making them a basis for military operations and preparations. These territorial waters become in consequence a part of the region of war,<sup>3</sup> and the other belligerent may also commit hostilities there. Similarly, if a State grants to another the right to maintain naval or air bases on its territory, such a concession, assuming that it does not altogether compromise the neutrality of the State in question, transforms into a region of war the parts of neutral territory put by treaty at the disposal of the belligerent and actually used by him.<sup>4</sup>

<sup>1</sup> There is no doubt that this attitude of Italy is explained by the fact that Egypt, although then legally under Turkish suzerainty, was actually under British occupation, and that Crete was forcibly kept by the Powers under Turkish suzerainty. Contrast the position of Egypt during the World War, both before the declaration of the British protectorate (*The Gutenfels* (1915) 1 B. and C.P.C. 102; 2 B. and C.P.C. 36; [1916] 2 A.C. 112) and after.

In *The Gutenfels* (*supra*) the Privy Council, adopting the statement in Hall, § 174, held that territory of a third State in the military occupation of one belligerent becomes enemy territory as regards the other. As to the present status of Egypt see above, vol. i. § 91.

<sup>2</sup> See below, § 320.

<sup>3</sup> See the judgment in the French case of *The Tinos* (1917), in *R.G.*, xxv. (1918), *Jurisprudence*, p. 3. The *Tinos* and twelve other German merchant-

men were captured by the Allies during the World War, in September 1916, in the roadsteads of several Greek ports. Since Greece was at that time still neutral, the German owners of the vessels claimed restitution on account of these vessels having been captured in neutral waters; but the French Prize Court condemned them because a succession of hostile acts committed by the enemy had turned Greek territorial waters into a part of the theatre of war. Greece did not claim the vessels, since she had meanwhile joined the Allies.

<sup>4</sup> In the treaty between Soviet Russia and Lithuania of October 10, 1939, the former was granted the right to maintain land and air armed forces of limited strength at certain points within Lithuanian territory. Air, naval, and land bases were also granted to Russia by the treaty with Latvia of October 5. In treaties concluded at that time Latvia and

But if in such an exceptional case neutral territory becomes the region and theatre of war, and is militarily occupied by a belligerent, the occupant does not possess such a wide range of rights with regard to the occupied country and its inhabitants as he possesses in occupied enemy territory. He can indeed resort to all measures which are necessary for the safety of his forces; but he cannot exact contributions or appropriate cash, funds, and realisable securities which are the property of the neutral State.<sup>1</sup>

§ 71a. It would seem to follow from the principles of mandatory government that mandated territories ought to remain outside the region of war. They cannot be regarded as sharing automatically the mandatory's status of belligerency, and their inhabitants do not, in their capacity as nationals of the mandated territory, become alien enemies in relation to the State with which the mandatory is engaged in war. For although the mandatory is entrusted with the conduct of the foreign relations in respect of the territories under mandate, the latter are not part of his territory and their inhabitants are not subjects of the mandatory. On the other hand, these territories, administered as they are by the mandatory, are intimately connected with him in many ways. This fact must necessarily influence their legal position. Thus as in the economic sphere it is impracticable to treat the mandated territory as a foreign country, it is inevitable that it must be made to participate in most of the economic measures directed against the enemy. Secondly, the armed forces of the mandatory are stationed and enjoy full freedom of movement in the mandated territories by virtue of the provisions of the various man-

Mandated  
Terri-  
tories as  
a Region  
of War.

Estonia granted similar facilities to Soviet Russia. By an Agreement concluded in 1938 with the Irish Free State Great Britain released the latter from the obligations of Articles 6 and 7 of the Agreement of 1921 relating to the use of certain Irish ports and harbours as naval bases: Cmd. 5728 (1938). An obligation of this nature rests upon South Africa in regard to the port of Simonstown. See *Round Table*, No. 118 (1940), p. 447.

<sup>1</sup> See Boeckner, *Der Kriegsschauplatz* (1911), pp. 145-208. Quite different, of course, is a case where a belligerent deliberately attacks a neutral State in order to force a passage through it, as Germany attacked Belgium in the World War. See Garner, §§ 431-452, and Nippold, *Die Verletzung der Neutralität Luxemburgs und Belgiens* (1920); Delvaux, *L'invasion de la Belgique devant la science allemande du droit des gens* (1930).



dates.<sup>1</sup> This being so the mandatory is entitled, subject to the fundamental principles of the régime of mandates as stated above,<sup>2</sup> to extend to the mandated territories his relevant war legislation,<sup>3</sup> and his adversary is justified in treating as a region of war parts of the mandated territory actually used in connection with military, naval, or air operations. At the outbreak of the war with Germany in September 1939 the British Trading with the Enemy Act prescribed that its provisions could be made applicable to any territory under a mandate held by Great Britain; the Prize Law Act of 1939 was made applicable to the mandated territories administered by Great Britain, Australia, and New Zealand.<sup>4</sup>

Exclusion  
from  
Region of  
War  
through  
Neutral-  
isation.

§ 72. Certain areas may be excluded from the region of war as the result of neutralisation.<sup>5</sup> This may be permanent,

<sup>1</sup> Article 17 of the Mandate for Palestine provides that 'the Mandatory shall be entitled at all times to use the roads, railways, and ports of Palestine for the movement of armed forces and the carriage of fuel and supplies.' Article 2 of the Mandate for Syria and Lebanon includes an identical provision. The 'B' and 'C' mandates contain provisions forbidding the mandatory to establish thereon fortifications or military or naval bases, but these restrictions are probably not inconsistent with the rights of passage of the kind laid down in the above-quoted provisions of the 'A' mandates. For comment on them see Stoyanovsky, *The Mandate for Palestine* (1928), pp. 216-218; Lewis in *L.Q.R.*, xxxix. (1923) p. 464. See below, § 323, on the incompatibility of neutrality with the duty to grant the right of passage to the forces of the belligerent.

<sup>2</sup> These include the prohibition to introduce compulsory conscription except for the purpose of defending the territory against actual or impending attack. The French mandates expressly permit the use of such troops outside the territory subject to the mandate. See on this question Wright, *Mandates under the League of Nations* (1930), pp. 471, 472. See also, generally, Minutes of

the 37th Session of the Mandates Commission (December 1939), pp. 119-122.

<sup>3</sup> For this reason it is probably correct to say that while the other belligerent would not be justified in treating the inhabitants of mandated territories as enemies by virtue of their nationality, he would be entitled to treat them for some purposes as alien enemies by virtue of their residence in a country under the jurisdiction of a belligerent.

<sup>4</sup> In September 1939 a contraband base was established at Haifa. A Proclamation was issued by the High Commissioner of Palestine announcing that war had broken out between His Majesty and Germany; at the same time the Supreme Court of Palestine was authorised to act as a Prize Court: *Palestine Gazette*, September 11, 1939, No. 929, Suppl. No. 2. In December 1939, in a note addressed to neutral countries whose nationals served on the Mandates Commission, Germany protested against what she described as the use of mandated territories by Great Britain and France for war purposes.

<sup>5</sup> Three terms are apt to be confused: (i) *demilitarisation*, which denotes the agreement of two or more States by treaty not to fortify, or station troops upon, a particular zone of territory; the purpose usually

as the result of a general treaty of the Powers, or temporary, through a special treaty between the belligerents. At present no part of the open sea is neutralised, as the neutralisation of the Black Sea was abolished<sup>1</sup> in 1871. The following are some important instances<sup>2</sup> of parts of territories<sup>3</sup> which are, or were at one time, permanently neutralised:

(1) The provinces of Chablais and Faucigny were permanently neutralised until the resettlement after the World War.<sup>4</sup>

(2) The Ionian Islands were permanently neutralised<sup>5</sup> when they merged in the kingdom of Greece. But this neutralisation was restricted<sup>6</sup> to the islands of Corfu and Paxo only by Article 2 of the Treaty of London of March 24, 1864.

(3) The mouth and some parts of the River Danube were closed to vessels of war by Article 52 of the Treaty of Berlin of 1878.<sup>7</sup> The Rivers Congo and Niger, and all their terri-

being to prevent war by removing the opportunities of conflict as the result of frontier incidents, or to gain security by prohibiting the concentration of troops on a frontier (see above, § 25i (n.), for illustrations, and vol. i. §§ 205, 206); (ii) *neutralisation*, which in this connection must be distinguished from the process of an international guarantee by treaty of the independence and integrity of a whole State and the condition resulting therefrom (see above, vol. i. §§ 95-101)—Switzerland, for instance—and denotes the exclusion by treaty of a particular part of the territory of a State from the region of war, so that warlike preparations or operations become illegal thereon (for instances see § 72); (iii) *internationalisation*, a term which has not yet acquired an established meaning, but which is beginning to be used to denote the status of an area of territory or water which has been dedicated by treaty to the public use of all or a large number of States (see, for instance, in Professor Schücking's dissenting judgment in the *Wimbledon*, Series A, No. 1, at p. 43); an area thus thrown open for general use may also be neutralised, as in the

case of the Suez and Panama Canals, but there seems to be no reason for this *ex necessitate rei*.

<sup>1</sup> See above, vol. i. §§ 181, 256.

<sup>2</sup> The matter is thoroughly treated in Rettich, *Zur Theorie und Geschichte des Rechtes zum Kriege* (1888), pp. 174-213. See also Schramm, pp. 83-87, and Graham in *A.J.*, xxi. (1927) pp. 79-94.

<sup>3</sup> See Krauel, *Neutralität, Neutralisation und Befriedung im Völkerrecht* (1915), pp. 48-90; Erich in *Hague Recueil*, 1929 (i.), pp. 591-667; Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933), pp. 369-429; and Marshall-Cornwall, *Geographic Disarmament* (1935).

<sup>4</sup> See above, vol. i. § 207.

<sup>5</sup> Through Article 2 of the Treaty of London of November 14, 1863.

<sup>6</sup> See Martens, *N.R.G.*, xviii. pp. 55, 63. See Wright in *A.J.*, xviii. (1924) pp. 104-108. Nevertheless, the Allies occupied Corfu during the World War as a rest camp for the Serbian army. See Garner, ii. § 464, and Leontiadis in *Z.S.R.*, ii. (1930) pp. 130 *et seq.*

<sup>7</sup> As to the provisions made with regard to the Danube after the World War see above, vol. i. § 459.

tories, were neutralised by Articles 25 and 33 of the Berlin Congo Act of 1885; but this Act was abrogated at the conclusion of the World War, in so far as it was binding between Powers which are parties to the new convention.<sup>1</sup>

(4) The Suez Canal has been permanently neutralised<sup>2</sup> since 1888.

The Panama<sup>3</sup> Canal is permanently neutralised through Article 3 of the Hay-Pauncefote Treaty of November 18, 1901. However, this treaty is not a general treaty of the Powers, but only one between Great Britain and the United States.<sup>4</sup>

(5) The Straits of Magellan<sup>5</sup> are permanently neutralised through Article 5 of the Boundary Treaty of Buenos Ayres of July 23, 1881, between Argentina and Chile.

The neutralisation provided for in these two cases is the concern of the contracting parties alone, and has no consequences for third States.

(6) In 1920, by a treaty of February 9 made between the United States of America, the British Empire, Denmark, France, Italy, Japan, Norway, Holland, and Sweden, recognising 'the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen,' Norway undertook not to construct any naval base or 'fortification in the said territories, *which may never be used for any warlike purposes*' (Article 9).<sup>6</sup>

(7) In 1921 the Finnish Archipelago called the Aaland Islands was, in accordance with the recommendation of the Council of the League upon the reference to it of a dispute

<sup>1</sup> See above, vol. i. § 564.

<sup>2</sup> See above, vol. i. § 183. As to the Suez Canal during the World War, and the effect of a breach of the Convention of 1888, see *The Sudmark* [1917] A.C. 620, 2 B. and C.P.C. 473, and *H.M. Procurator in Egypt v. Deutsches Kohlen Depot* [1919] A.C. 291, 3 B. and C.P.C. 264.

<sup>3</sup> See above, vol. i. § 184. And see below, § 325c.

<sup>4</sup> But note that in the *Wimbledon*, Series A, No. 1, the Permanent Court of International Justice referred to the Suez and Panama Canals as having been 'permanently dedicated to

the use of the whole world' (at p. 28). The Kiel Canal, although assimilated to the Suez and Panama Canals as regards transit, was not, like them, put outside the region of war; see Professor Schücking's dissenting judgment in the above case (at p. 46), which is, it seems, on this point not affected by the majority judgment.

<sup>5</sup> See Martens, *N.E.G.*, 2nd ser., xii. p. 491, and above, vol. i. § 195; *The Bangor* (1916) 2 B. and C.P.C. 206; [1916] P. 181.

<sup>6</sup> Treaty Series, No. 18 (1924), Cmd. 2092; *A.J.*, xviii. (1924), Suppl., pp. 199-208.

between Sweden and Finland, neutralised by a Convention of October 20, 1921, made between Germany, Denmark, Esthonia, Finland, France, the British Empire, Italy, Latvia, Poland, and Sweden; by its terms the Islands are made a 'neutral zone,' not to be fortified or used for any purpose connected with military operations.<sup>1</sup>

(8) In 1923, by a Convention of December 18 between the British Empire, Spain, and France, the 'Tangier Zone,' as therein defined, was 'placed under a regime of permanent neutrality.'<sup>2</sup>

§ 73. That at present no part of the open sea is neutralised is universally recognised, and this applies to the Baltic Sea, which is admittedly part of the open sea. Some writers,<sup>3</sup> however, maintained before the World War that the littoral States of the Baltic had a right to forbid all hostilities within it in a war between States other than themselves, and could thereby neutralise it without the consent, and even against the will, of the belligerents. This opinion was based on the fact that, during the eighteenth century, these littoral States claimed that right in several conventions; but it appeared untenable, because it was opposed to the universally recognised principle of the freedom of the open sea. As no State has territorial supremacy over parts of the open sea, it is difficult to see how such a claim could be

Asserted  
Exclusion  
of the  
Baltic Sea  
from the  
Region of  
War.

<sup>1</sup> Treaty Series, No. 6 (1922), Cmd. 1680; *A.J.*, xvii. (1923), Suppl., pp. 1-6; Colijn, *La décision de la Société des Nations concernant les Iles d'Aland* (1923); Strupp, *op. cit.*, pp. 389-398; Jézan du Laz, *La question des Iles d'Aland* (1923); Söderhjelm, *Démilitarisation et neutralisation des Iles d'Aland* (1928); Remsperger, *Die Rechtslage der Alandsinseln* (1933); Vortisel, *Die Alandfrage* (1933); Gregory in *A.J.*, xvii. (1923) pp. 63-76; Erich in *Hague Recueil*, 1929 (i), pp. 632-658; Padelford and Anderson in *A.J.*, xxxiii. (1939) pp. 465-487. See also vol. i. § 205. In May 1939 Finland and Sweden asked that the question of the non-fortification and neutralisation of the Aaland Islands be placed on the agenda of the Council meeting, with the view to their abolition. At

the request of the Soviet Government the matter was postponed: *Off. J.*, 1939, p. 279. In September 1939 Finland issued a decree prohibiting warships of belligerents from entering the territorial waters of the Aaland Islands.

<sup>2</sup> Treaty Series, No. 23 (1924), Cmd. 2203. See also below, § 368 (n.), and vol. i. § 95. The Constitution of the Free City of Danzig, May 1922, provided that it 'cannot, without the previous consent of the League of Nations in each case, (1) serve as a military or naval base; (2) erect fortifications; (3) authorise the manufacture of munitions or war material on its territory.' (*Off. J.*, Special Suppl. No. 7.)

<sup>3</sup> See Perels, pp. 160-163, who discusses the question at some length and answers it in the affirmative.

justified<sup>1</sup>; and, in fact, during the World War, hostilities did take place in the Baltic.<sup>2</sup>

## V

## THE BELLIGERENTS

Vattel, iii. § 4—Phillimore, iii. §§ 92-93—Taylor, §§ 458-460—Wheaton, § 294—Bluntschli, §§ 511-514—Heffter, §§ 114-117—Lueder in *Holtzendorff*, iv. pp. 237-248—Klüber, § 236—G. F. Martens, ii. § 264—Gareis, § 83—Liszt, 56, A—Ullmann, §§ 168-169—Pradier-Fodéré, vi. Nos. 2656-2660—Rivier, ii. pp. 207-216—Nys, iii. pp. 23-26—Mérignhac, iii<sup>2</sup>, pp. 136-139—Martens, ii. § 108—Heilborn, *System*, pp. 333-335—Rolin, §§ 936-950—Smith, *Great Britain and the Law of Nations*, i. (1932) pp. 261-333—Cavaglieri in *Rivista*, 2nd ser., viii. (1919) pp. 58-91 and 328-362.

Qualifica-  
tion to  
become a  
Belli-  
gerent  
(*facultas  
bellandi*).

§ 74. As International Law recognises the status of war, and its effects as regards rights and duties between the belligerents on the one hand, and between the belligerents and neutral States on the other, the question arises what kind of States are legally qualified to make war, and thereby to become belligerents. According to the Law of Nations, full sovereign States alone possess the legal qualification to become belligerents<sup>3</sup>; half and part sovereign States are not legally qualified to become belligerents. Since neutralised States, such as Switzerland, are full sovereign States, they are legally qualified to become belligerents, although their neutralisation binds them not to make use of their qualification, except for defence. If they become belligerents

<sup>1</sup> See Rivier, ii. p. 218; Nys, i. pp. 448-450.

<sup>2</sup> Different from cases of this kind is the special protection during war arranged in special conventions for certain establishments. Although the terms 'neutrality' and 'neutralisation' are often used, they are not strictly applicable. Thus, Article 3 of the Treaty of Tangier of May 31, 1865, provided for the 'neutrality' of the lighthouse at Cape Spartel. See Gidel, *Le droit international public de la mer*, i. (1932) p. 381; Martens, *N.R.G.*, xx. p. 350; but see also Martens, *N.R.G.*, 2nd ser., iii. p. 560 and ix. p. 227. Again, according to Article 21 of the Danube Navigation Act signed at Galatz on

November 2, 1865, the works and establishments of all kinds created by the European Danube Commission were to enjoy the benefits of 'neutrality.' See Martens, *N.R.G.*, xviii. p. 144. The Treaty of October 14, 1920, between Finland and Russia provided in Article 13 for the 'military neutralisation' of a number of Finnish islands in the Gulf of Finland; *L.N.T.S.*, 3, p. 69. And see the Treaty of October 26, 1905, between Norway and Sweden establishing, in Article 1, a neutralised zone on both sides of the common frontier: Martens, *N.R.G.*, 2nd ser., xxxiv. p. 703.

<sup>3</sup> On the question whether the League of Nations can be a belligerent see former edition, § 66a.

because they are attacked, they do not lose their character as neutralised States ; but if they become belligerents for offensive purposes, they *ipso facto* lose this character.<sup>1</sup>

§ 75. Such States as do not possess the legal qualification to become belligerents are by law prohibited from offensive or defensive warfare. But the possession of armed forces makes it possible for them in fact to enter into war, and to become belligerents. History records instances enough of such States having actually made war. Thus in 1876 Serbia and Montenegro, although at that time vassal States under Turkish suzerainty, declared war against Turkey, and on February 28, 1877, peace was concluded between Turkey and Serbia.<sup>2</sup> And when in April 1877 war broke out between Russia and Turkey, the then Turkish vassal State Roumania joined Russia, and Serbia declared war anew against Turkey in December 1877.

Possibility to become a Belligerent.

Whenever a State lacking the legal qualification to make war nevertheless actually makes war, it is a belligerent, the contention is real war, and all the rules of International Law respecting warfare apply to it.<sup>3</sup> Therefore, an armed contention between suzerain and vassal, and between a Federal State and one or more of its members, is war<sup>4</sup> in the technical sense of the term according to the Law of Nations.

§ 76. The distinction between legal qualification and actual power to make war explains the fact that insurgents may become a belligerent Power through recognition. The principles governing recognition of belligerency are essentially the same as those relating to the recognition of States and Governments.<sup>5</sup> Certain conditions of fact, not stigmatised as unlawful by International Law—the Law of Nations does not treat civil war as illegal—create for other States the right and the duty to grant recognition of belligerency.<sup>6</sup> These

Recognition of Belligerency.

<sup>1</sup> The position of a neutralised State as a belligerent is discussed in detail by Rolin, §§ 936-950.

<sup>2</sup> See Martens, *N.R.G.*, 2nd ser., iii, pp. 171-173.

<sup>3</sup> This is quite apparent from the fact that Bulgaria by accession became a party to the Geneva Convention at a time when she was still a vassal State under Turkish suzerainty.

<sup>4</sup> See above, § 56, and Baty, *International Law in South Africa* (1900), pp. 66-68.

<sup>5</sup> See above, vol. i. §§ 71a, 75bb.

<sup>6</sup> It is believed that the lawful Government is in any case entitled to assert belligerent status and the resulting belligerent rights. Thus, for instance, it has not been suggested that during the American Civil War

conditions of fact are : the existence of a civil war accompanied by a state of general hostilities ; occupation and a measure of orderly administration of a substantial part of national territory by the insurgents ; observance of the rules of warfare on the part of the insurgent forces acting under a responsible authority ; the practical necessity for third States to define their attitude to the civil war. Without the latter requirement recognition of belligerency might be open to abuse for the purpose of a gratuitous manifestation of sympathy with the cause of the insurgents. In the absence of these conditions recognition of belligerency constitutes illicit interference in the affairs of the State affected by civil disorders—an international wrong analogous to the premature recognition of a State or a Government.<sup>1</sup> Refusal to recognise belligerent status notwithstanding the existence of these conditions must be deemed contrary to sound principle<sup>2</sup> and precedent.<sup>3</sup>

it was open to Great Britain to deny to the United States the right to proclaim a blockade or, generally, to exercise belligerent rights. However, in the course of the Spanish Civil War in 1936-1939 Great Britain and other States insisted that they refused to grant belligerent rights to either side. See, e.g., the Preamble of the Nyon Agreement of September 1937 : Cmd. 5568. And see House of Commons *Debates*, 357, col. 330, for a statement of the Secretary of State of December 8, 1937, refusing on this ground to recognise a blockade proclaimed by the insurgents.

<sup>1</sup> See above vol. i. § 74.

<sup>2</sup> However, a considerable number of writers are of the view that recognition of belligerency is in relation to the insurgents an act of unfettered political discretion. See, for instance, Hall, *International Law* (3rd ed., 1890), p. 34 ; Woolsey, *International Law* (6th ed., 1891), Appendix III. n. 19 ; Wiesse, *Le droit international appliqué aux guerres civiles* (1898), p. 20 ; Rougier, *Les guerres civiles et le droit des gens* (1903), p. 383 ; Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (1928), p. 192 ; *Harvard Research, Neutrality* (1939), p. 210 ; Padelford, *International Law and Diplomacy in the Spanish Civil*

*War* (1939), p. 8 ; McNair in *L.Q.R.*, 53 (1937), p. 483. Westlake, i. p. 53, although doubting whether the right to recognition has already become a legal one, approves of it 'on the ground of reason.' But see in favour of what may be called the legal view of recognition of belligerency Vattel, bk. iii. ch. xviii. § 293 ; Bluntschli, § 512, n. 1 ; Fiore (French translation, 1886), iii. p. 39 ; Lorimer, i. p. 141 ; Wheaton (1st ed., 1836), i. p. 92 ; Rolin in Lapradelle-Politis, ii. pp. 215-217 ; Smith in *B.Y.*, xxx. (1937) pp. 405-407 ; Wehberg in *Hague Recueil*, 63 (1938) (i.), pp. 108-111, and in *Friedenswarte*, 37 (1937), p. 398 ; Scelle, *ibid.*, p. 65.

The Institute of International Law adopted in 1900 a set of rules concerning the rights and duties of foreign States in cases of insurgency. Articles 4-9 deal with the recognition of the belligerency of insurgents. See *Annuaire*, xvii. p. 227. See also the Havana Convention of February 20, 1928, on the Duties and Rights of States in the Event of Civil Strife : Hudson, *Legislation*, iv. p. 2416.

<sup>3</sup> See, e.g., Canning's despatch of 1825 (cited by Hall, 3rd ed. (1890), p. 33, n. 1) stating in connection with the rebellion in Greece that 'a certain degree of force and consistency ac-

Although there are only a few examples of recognition of belligerency by means of a formal declaration of neutrality, as in the case of the British recognition of the belligerency of the Confederate States in May 1861,<sup>1</sup> recognition of belligerency in other ways is not an infrequent occurrence. But care must be taken in each particular case not to treat as recognition of belligerency what has properly been described as recognition of insurgency,<sup>2</sup> namely, a measure of intercourse with the insurgent authorities and acquiescence in the exercise of some warlike activities on their part.<sup>3</sup> The mere fact of widespread hostilities in the course of the civil war will not in itself warrant or impose the duty of recognition. Thus during the Cuban insurrection against Spain the United States repeatedly refused to recognise belligerency on the ground that the rebels had not succeeded in establishing an orderly administration.<sup>4</sup> During the Spanish Civil War of 1936-1939 recognition of belligerency was correctly refused for the reason that the accepted rules of recognition of belligerency did not apply to a situation in which as a result of the illegal intervention of foreign States the hostilities had lost the character of a civil war in the accepted meaning of the term.<sup>5</sup>

quired by a mass of population engaged in war, entitled that population to be treated as a belligerent.' See *Hansard*, 3rd ser., 162, cols. 1563, 1566, for a re-affirmation of that view in relation to the recognition of the belligerency of the Confederate States in 1861; and see Smith, i. p. 318, as to the Civil War in Spain in 1864. McNair, *loc. cit.*, gives reasons in support of the view that Canning's pronouncement cannot be regarded as a statement of a legal principle. See also, as to the United States, the Message of President Monroe of March 8, 1882, quoted in Moore, i. p. 174.

<sup>1</sup> *B.F.S.P.*, 51, p. 165. In issuing the Proclamation of Neutrality Great Britain relied on the proclamation of the President of the United States establishing a blockade of some of the ports of the disaffected States: *ibid.*, p. 185. For an earlier proclamation of neutrality see that issued by the Senate of the Ionian Islands in 1821 in connection with the Greek rebellion: *ibid.*, 8, p. 1282.

<sup>2</sup> See above, vol. i. § 75g.

<sup>3</sup> See, e.g., Smith in *B.Y.*, xviii. (1937) pp. 22-25, who maintains that during the Spanish Civil War of 1936-1939 Great Britain by her conduct recognised the belligerency of the insurgents. Actually, she persistently refused to do so. See also Walker in *Grotius Society*, 23 (1938), pp. 177-210.

<sup>4</sup> See, for instance, President Grant's Message of December 1875: Moore, i. p. 196.

<sup>5</sup> See, for the statement to this effect by the Secretary of State on June 25, 1937, House of Commons *Debates*, 325, col. 1608. When in July 1938 Great Britain and other Powers made the granting of recognition of belligerency conditional upon the withdrawal of foreign armed forces from Spain, that condition, far from constituting an attempt to make the duty of recognition the object of a bargain, was a legitimate effort to restore to the contest the character of a civil war which alone would have rendered proper the granting of recognition.



Recogni-  
tion of  
Subjects  
of the  
Enemy as  
Allied  
Belli-  
gerents.

§ 76a. Recognition by third States is not as a rule binding upon the parent State. Notwithstanding such recognition, it is entitled to treat insurgents as traitors. But the position is controversial with regard to recognition as a belligerent Power granted to separate armies which comprise subjects of the enemy who are fighting to free their nation from his rule and which are responsible to an authority recognised as representing the nation in question. Thus in 1918, during the World War, Great Britain, France, Italy, and the United States of America recognised the Czecho-Slovaks as co-belligerents.<sup>1</sup> Similar recognition was granted in 1917 to the Polish national army composed to a substantial degree of subjects of the enemy Powers.<sup>2</sup> It has been maintained that, as in the case of insurgents in a civil war, the enemy is entitled to disregard such recognition and to treat the members of the insurgent army, when they fall into his hands, in accordance with the provisions of his criminal law.<sup>3</sup> The better opinion is probably that when such recognition is granted by the adversary to large bodies of men effectively organised on foreign soil in anticipation

<sup>1</sup> See Garner, i. § 26; Hobza in *R.G.*, xxix. (1922) pp. 387, 388; Buza in *Z.V.*, xiii. (1924) pp. 114, 115; Temperley, *History of the Peace Conference*, v. (1920) pp. 159-160; and Hyde (i. § 40), who, perhaps too rigidly, regards the incident rather as a 'form of belligerent activity' than an exercise of the right of recognition. Analogous recognition was extended by the Allies to the Czecho-Slovak forces in 1939 during the war with Germany. However, these forces were not composed of *subjects* of the enemy. The German Protectorate established in March 1939 over Bohemia and Moravia was not recognised *de jure* by Great Britain and France, and these States were entitled to regard the Czecho-Slovak forces in France as the reconstituted army of the *de jure* still existing Czecho-Slovak State. See *The Times* newspaper of December 22, 1939, on the recognition of the Czecho-Slovak National Committee by Great Britain. See also some observations on war-time recognitions by the Committee of Jurists on the

Aaland Islands Question, *Off. J.*, Special Suppl. No. 3, at p. 8.

<sup>2</sup> On the recognition of the Polish National Committee and the Polish national army by the Allies in 1917 see Blociszewski in *R.G.*, xxviii. (1921) pp. 5-70 (especially 66-70), and Fauchille, §§ 175 (1) and 200 (2). See also *Case concerning Certain German Interests in Polish Upper Silesia* (P.C.I.J., Series A, No. 7, pp. 27-29), where the Permanent Court held, in regard to claims put forward by Poland under the Armistice Agreement, that the recognition by the Principal Allied Powers of the Polish armed forces as an allied, autonomous, and co-belligerent army could not be relied on as against Germany which had not granted such recognition. See also Series C, No. 11, ii. pp. 617-634 and 816-822. And see Smith, *Great Britain and the Law of Nations*, i. (1932) pp. 261-333, for a survey of the British practice prior to the World War.

<sup>3</sup> See § 76a of the previous editions of this volume.

of independent statehood, a point is reached at which the belligerent confronted with the disaffection and desertion of a considerable number of his subjects engaged in hostilities against him can no longer, without exposing himself to justifiable retaliation, assert the provisions of his own criminal law as the only legally relevant element in the situation.

§ 77. War occurs usually between two States, one on each side. But in some wars there are on one or on both sides several parties, and then principal and accessory belligerents are sometimes to be distinguished.

Principal  
and Accessory  
Belligerent  
Parties.

Principal belligerents are those parties to a war who wage it on the basis of a treaty of alliance,<sup>1</sup> whether concluded before or during the war. Accessory belligerents are such States as provide help and succour only in a limited way to a principal belligerent; for instance, by paying subsidies, sending a certain number of troops or men-of-war, granting a coaling station to the men-of-war of a principal party, allowing his troops a passage through their territory, and the like. Such accessory party becomes a belligerent through rendering help, except when there exists a treaty in which the belligerent who is adversely affected by such help has in advance agreed that in certain contingencies the neutral State or States shall be entitled to discriminate against him.<sup>2</sup>

The matter need hardly be mentioned at all, were it not that writers formerly discussed whether or not a neutral State which fulfilled in time of war a treaty concluded in time of peace, by the terms of which it had to grant a coaling station, the passage of troops through its territory,

<sup>1</sup> See vol. i. §§ 569-573. Allies are not necessarily co-belligerents, for the particular *casus foederis* may not have arisen, or, having arisen, may not have been acted upon (Halleck (1861), p. 413; 4th English ed. (1908), ii. p. 3); nor are co-belligerents necessarily allies, for they may be merely associated with one another for the purpose of the war. Thus in the World War the United States of America were an 'Associated,' not an 'Allied' Power; the term 'associate,' as contrasted with 'ally,' suggests the absence of a common

agreement as to the objects on the attainment of which the war will be terminated.

<sup>2</sup> See below, §§ 305 and 306a. But the question acquires a new significance in view of the duty, under Article 16 of the Covenant, to apply economic sanctions and to grant the right of passage for troops co-operating for the protection of the Covenant; upon this see below, §§ 292b-292d and 305, and note Annex F in the 'Locarno Pact,' Cmd. 2525; *A.J.*, xx. (1926), Suppl., p. 32, and above, § 66a, and below, § 292d.

and the like, to one of the belligerents, violated its neutrality. This question is identical with the question<sup>1</sup> whether a qualified neutrality, in contradistinction to a perfect neutrality, is admissible. Since the answer to this question is, in the absence of contrary treaty provisions, in the negative, a State which fulfils a treaty obligation of this kind in time of war may be considered by the other side to be an accessory belligerent.

## VI

## THE ARMED FORCES OF THE BELLIGERENTS

Vattel, iii. §§ 223-231—Hall, §§ 177-181—Lawrence, §§ 148-150—Westlake, ii. pp. 64-67—Phillimore, iii. § 94—Twiss, ii. § 45—Halleck, i. pp. 608-617—Hershey, Nos. 352-354, 403—Taylor, §§ 471-476—Moore, vii. § 1109—Wheaton, §§ 356-358—Bluntschli, §§ 569-572—Heffter, §§ 124-124<sup>a</sup>—Lueder in *Holtzendorff*, iv. pp. 371-387—G. F. Martens, ii. § 271—Liszt, § 58, B—Fauchille, §§ 1067-1077 (1)—Despagnet, Nos. 520-523—Mérignhac, iii<sup>a</sup>. pp. 139-155—Pradier-Fodéré, vi. Nos. 2721-2732, and viii. Nos. 3091-3103—Nys, iii. pp. 85-134—Rivier, ii. pp. 242-259—Calvo, iv. §§ 2044-2065—Fiore, iii. Nos. 1303-1316, and *Code*, Nos. 1460-1480—Martens, ii. § 112—Cruchaga, §§ 798-816—De Louter, ii. pp. 250-257—Hyde, ii. §§ 648-654, 703-709—Keith's Wheaton, pp. 713-721, 812-821—Longuet, §§ 26-36—Pillet, pp. 35-59—*Kriegsbrauch*, pp. 4-8—Perels, § 34—Boeck, Nos. 209-213—Dupuis, Nos. 74-91—Lawrence, *War*, pp. 195-218—Zorn, pp. 36-73—Bordwell, pp. 228-236—*Land Warfare*, §§ 17-38—Meurer, ii. §§ 11-20—Spaight, *Land*, pp. 45-72—Ariga, pp. 74-91—Takahashi, pp. 89-93—Schramm, §§ 12, 16—Wehberg, § 4—Garner, i. §§ 245, 250-264—Balladore Pallieri, pp. 171-184—Kunz, pp. 63-66, 109-122—Genet, §§ 64-113—Sandiford, *Diritto maritimo di guerra* (1938), pp. 136-156—Butler and Maccoby, *The Development of International Law* (1928), pp. 124-143.

Regular  
Armies  
and  
Navies.

§ 78. The chief part of the armed forces of the belligerents are their regular armies and navies and air forces. What kinds of forces constitute a regular army and a regular navy is not for International Law to determine, but is a matter of Municipal Law exclusively. Whether or not so-called militia and volunteer corps belong to armies rests entirely with the Municipal Law of the belligerents; and there are several States whose armies consist of militia and volunteer corps exclusively, no standing army being provided for. The Hague Regulations expressly stipulate<sup>2</sup> that in countries

<sup>1</sup> See below, § 305.

<sup>2</sup> Article 1.

where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army.' It is likewise irrelevant to consider the composition of a regular army, whether it is based on conscription or not, whether foreigners <sup>1</sup> as well as subjects are enrolled, and the like.

§ 79. In the main, armed forces consist of combatants; but no army in the field consists of combatants exclusively. There are always several kinds of other individuals, such as couriers, doctors, farriers, veterinary surgeons, chaplains, nurses, official and voluntary ambulance men, contractors, canteen-caterers, newspaper correspondents,<sup>2</sup> civil servants, diplomatists, and foreign military attachés<sup>3</sup> in the suite of the commander-in-chief.

Non-Combatant  
Members  
of Armed  
Forces.

Writers on the Law of Nations do not agree as regards the position of these non-combatants; they are not mere private individuals, yet are certainly not combatants, although they may—as, for instance, couriers, doctors, farriers, and veterinary surgeons—have the character of soldiers. They may correctly be said to belong *indirectly* to the armed forces. Article 3 of the Hague Regulations expressly stipulates that the armed forces of the belligerents may consist of combatants and non-combatants, and that both, in case of capture, must be treated as prisoners of war, provided<sup>4</sup> they produce a certificate of identification from the military authorities of the army which they accompany. However, when one speaks of armed forces generally, combatants only are under consideration.

The question whether women may be considered as non-combatant members of armed forces came into prominence during the World War, when thousands were enrolled and sent to the front to serve as army cooks, drivers, store-keepers, and the like. The question must be answered in the affirmative.<sup>5</sup> This seems to have been indirectly recognised by the Geneva Convention of 1929 on the Treatment

<sup>1</sup> See below, § 82a and § 322.

<sup>4</sup> See below, § 127.

<sup>2</sup> See Rey in *R.G.*, xvii. (1910) pp. 73-102, and Higgins, *War and the Private Citizen* (1912), pp. 91-112.

<sup>3</sup> See Rey in *R.G.*, xvii. (1910) pp. 63-73.

<sup>5</sup> And see above, p. 171 and n. 2, on the vanishing distinction between the armed forces and the civilian population.

of Prisoners of War,<sup>1</sup> which laid down, in Article 3, that women prisoners of war 'shall be treated with all consideration due to their sex.'

Irregular  
Forces.

§ 80. Very often the armed forces of belligerents consist throughout the war of their regular armies only; but it happens frequently that irregular forces take part. Of such irregular forces two different kinds are to be distinguished—first, such as are authorised by the belligerents; and, secondly, such as are acting on their own initiative, and on their own account, without special authorisation. Formerly, it was a recognised rule of International Law that only the members of authorised irregular forces enjoyed the privileges due to the members of the armed forces of belligerents; members of unauthorised irregular forces were considered to be war criminals, and could be shot when captured. During the Franco-German War in 1870, the Germans acted throughout according to this rule with regard to the so-called 'franc-tireurs,' requesting the production of a special authorisation from the French Government from every irregular combatant whom they captured, failing which he was shot. But according to Article 1 of the Hague Regulations this rule is now obsolete; and its place is taken by the rule that irregulars enjoy the privileges due to members of the armed forces of the belligerents, although they do not act under authorisation, provided (1) that they are commanded by a person responsible<sup>2</sup> for his subordinates; (2) that they have a fixed distinctive emblem recognisable at a distance<sup>3</sup>; (3) that they carry arms openly<sup>4</sup>; and (4) that they conduct their operations in accordance with the laws and customs of war. It must, however, be

<sup>1</sup> See below, § 125.

<sup>2</sup> The meaning of the word 'responsible' (*responsable*) is not clear. It probably means 'responsible to some higher authority,' whether the person is appointed from above or elected from below; see also Kirchheim in *Strupp, Wört.*, i. p. 654.

<sup>3</sup> The distance at which the emblem should be visible is undetermined. See *Land Warfare*, § 23, where it is pointed out that it is reasonable to expect that the sil-

houette of an irregular combatant standing against the skyline should be at once distinguishable from that of a peaceable inhabitant by the naked eye of ordinary individuals, at a distance at which the form of an individual can be determined.

<sup>4</sup> See *Land Warfare*, § 26; individuals whose sole arm is a pistol, a hand-grenade, a dagger concealed about the person, or a sword-stick, are not such as carry their arms openly.

emphasised that this rule applies only to irregulars fighting in bodies, however small. Such individuals as take up arms or commit hostile acts singly and severally are still liable to be treated as war criminals and shot.<sup>1</sup>

§ 81. It sometimes happens during war that, on the approach of the enemy, a belligerent calls the whole population of the country to arms, and thus makes them a part, although a more or less irregular part, of his armed forces. Provided they receive some organisation, and comply with the laws and usages of war, the combatants who take part in such a levy *en masse* organised by the State enjoy the privileges due to members of armed forces. Levies *en masse*.

Or, again, sometimes a levy *en masse* takes place spontaneously, without organisation by a belligerent, and the question arises whether, or not, those who take part in such levies *en masse* belong to the armed forces of the belligerents, and therefore enjoy the privileges due to members of such forces. Article 2 of the Hague Regulations stipulates that the population of a territory not yet occupied who, *on the enemy's approach*, spontaneously take up arms to resist the invading enemy, without having time to organise themselves under responsible commanders and to procure fixed distinctive emblems recognisable at a distance, shall nevertheless enjoy the privileges due to armed forces, provided that they carry arms openly, and act otherwise in conformity with the laws and usages of war. Totally different, however, is a levy *en masse* of the population of a territory already invaded by the enemy, for the purpose of freeing the country from the invader. Article 2 of the Hague Regulations does not cover this case, in which, therefore, the old customary rule of International Law is valid, that those taking part in such a levy *en masse* are liable to be shot if captured.<sup>2</sup>

It is of particular importance not to confuse invasion with occupation in this matter. Article 2 distinctly speaks of the *approach* of the enemy, and thereby sanctions only such

<sup>1</sup> See below, § 254. See also Meurer in *Strupp, Wört.*, iii. pp. 467-471.

<sup>2</sup> See below, § 254. Note, however, that Articles 1 and 2 of the Hague

Regulations are in a very special degree subject to the provisions of paragraph iv. of the Preamble of the Regulations.

a levy *en masse* as takes place in territory not yet invaded by the enemy. Once the territory is invaded, although the invasion has not yet ripened into occupation,<sup>1</sup> a levy *en masse* is no longer legitimate. But, of course, the term *territory*, as used by Article 2, is not intended to mean<sup>2</sup> the whole extent of the State of a belligerent, but only such parts of it as are not yet invaded. For this reason, if a town is already invaded, but not a neighbouring town, the inhabitants of the latter may, on the approach of the enemy, legitimately rise *en masse*. And it matters not whether the individuals, in doing so, are acting in immediate combination with a regular army or separately from it.<sup>3</sup>

Barbarous  
Forces.

§ 82. Writers used to discuss the question, which some tended to deny, whether it is permissible to employ troops consisting of individuals belonging to savage tribes and barbarous races. The question is now largely a theoretical one. There is no reason why such troops should not be employed provided that it can be assumed that they would or could comply with the laws and usages of war prevalent according to International Law.<sup>4</sup> In any case the employment of barbarous forces must not be confused with the enrolling of coloured individuals into the regular army and the employment of regiments consisting of disciplined coloured soldiers. There is no reason whatever why, for instance, the members of a regiment formed by the United States of America out of negroes bred and educated in America, or members of Indian regiments under British com-

<sup>1</sup> Concerning the difference between invasion and occupation, see below, § 167.

<sup>2</sup> See *Land Warfare*, §§ 31-32.

<sup>3</sup> See *Land Warfare*, § 34.

<sup>4</sup> See Hyde, ii. § 650: 'Tested by the requirements of the Hague Regulations, no legal duty appears to forbid a State to employ and confer belligerent qualifications upon persons of any race or color, who are capable of being subjected to military discipline, and who conform in fact to the conditions prescribed.' See Liszt, § 59 (5), and note paragraph 5 of Article 22 of the Covenant.

A somewhat different question is

whether in a contest between a 'civilised' State and 'barbarous' forces the ordinary laws of war apply: see Wright in *A.J.*, xx. (1926) pp. 267-268, and literature there cited; Colby in *A.J.*, xxi. (1927) pp. 279-288; the same in *Georgetown Law Journal*, xv. (1926) p. 24; Kunz in *Z.ö.R.*, vii. (1927) pp. 86-99; and above, § 56 (n.).

As regards the limited use made of armed natives as scouts, and the like, on the part of the British commanders during the South African War see *The Times History of the War in South Africa*, v. pp. 249-251. The Boers refused quarter to any who fell into their hands.

manders, should not, in wars between members of the Family of Nations, enjoy the privileges due to members of armed forces according to International Law.<sup>1</sup> In fact, the United States employed two coloured cavalry regiments in Cuba during her war with Spain, and during the World War some Indian regiments were employed by Great Britain in France.

§ 82a. A belligerent is permitted to enlist the subjects of other States, whether allies or neutrals, into its forces, either as combatants or as non-combatants, and hardly a single war occurs in which this is not done.<sup>2</sup> Nor do the alien subjects who thus enlist commit thereby any offence against the rules of International Law; they are in no better and no worse position, as regards the enemy, than the subjects of the State whose forces they have joined.<sup>3</sup>

§ 83. Formerly privateers were a generally recognised part of the armed forces of the belligerents, private vessels being commissioned by the belligerents through letters of marque to carry on hostilities at sea, and particularly to capture enemy merchantmen.<sup>4</sup> From the fifteenth century, when privateering began to grow up, down to the eighteenth century, belligerents used to grant letters of marque to private ships owned by neutral subjects as well as by their own. But during the eighteenth century it became the practice to grant them only to ships belonging to their own subjects. However, privateering was abolished by the Declaration of Paris in 1856 as between the signatory Powers and others who acceded to it later. Although privateering would still be legal as between other Powers, it is unlikely that in future it will be made use of. In all the wars that have occurred since 1856 between such Powers, no letters of marque have been granted.<sup>5</sup>

<sup>1</sup> See Spaight, *Air*, pp. 85-86.

<sup>2</sup> See Hyde, ii. § 651; Fauchille, §§ 1074(3) and 1074(4), including note on the French Foreign Legion.

<sup>3</sup> See below, § 88. This is doubted by Borchard—in *A.J.*, xxxii. (1938) pp. 537, 538—but there is no reason to believe that the legislation or the courts of any country have questioned this sound rule.

<sup>4</sup> See Martens, *Essai concernant les armateurs, les prises et surtout les*

*reprises* (1795); La Mache, *La guerre de la course* (1901); Willms, *Die Umwandlung von Kauffahrteischiffen in Kriegsschiffe* (1912); Wehberg, § 4; Verzijl, §§ 178-180; Genet, §§ 114-140; Pares, *Colonial Blockade and Neutral Rights 1739-1763* (1938), pp. 1-76.

<sup>5</sup> See below, § 177, and Malkin in *B.Y.*, 1927, pp. 41-44. See also Munro-Butler Johnstone, *Handbook of Maritime Rights; and the Declara-*



Converted  
Merchant-  
men.

§ 84. A case which happened in 1870, soon after the outbreak of the Franco-German War, raised the question whether converted<sup>1</sup> merchantmen could be considered part of the armed naval forces of a belligerent. As the North-German Confederation owned only a few men-of-war, steps were taken to create a volunteer fleet. The King of Prussia, as President of the Confederation, invited the owners of private German vessels to make them part of the German navy under the following conditions: every ship should be assessed as to her value, and 10 per cent. of it should at once be paid in cash to the owner, as a price for the charter of the ship. The owner should engage the crew himself, but they should become for the time of the war members of the German navy, and wear the German naval uniform. The ship should sail under the German war flag, and be armed and adapted for her purpose by the German naval authorities. Should she be captured or destroyed by the enemy, the assessed value should be paid to her owners in full; but should she be restored after the war undamaged, the owner should retain the 10 per cent. received as charter price. All such vessels should only try to capture or destroy French men-of-war, and, if successful, the owner should receive between £1500 and £7500 as a premium. The French Government considered this scheme a disguised evasion of the Declaration of Paris which abolished privateering, and requested the intervention of Great Britain. The British Government brought the case before the law officers of the Crown, who declared the German scheme to be substantially different from the revival of privateering, and consequently the British Government refused to object to it. The scheme, however, was never put into practice.<sup>2</sup>

In spite of the opinion of the British law officers, writers on International Law differ as to the legality of the above

*tion of Paris considered* (1876); Gibson Bowles, *The Declaration of Paris of 1856* (1900); Perels, pp. 177-179; *Harvard Research* (1939), pp. 333, 334; and see above, vol. i. § 12.

<sup>1</sup> See Guichéneuc, *La marine auxiliaire en droit international* (1900); Willms, *op. cit.*; *Kriege in Z.I.*, xxvi. (1915) pp. 71-117; Schade,

*Umwandlung von Kauffahrteischiffen in Kriegsschiffe* (1917); Willms-Bonn, *Die seekriegsrechtliche Bedeutung von Flottenstützpunkten*, i. (1918) pp. 113-193; Beer, *Die Hilfskreuzerfrage* (1919); Proehl, *Die Umwandlung von Handelsschiffen in Kriegsschiffe* (1920).

<sup>2</sup> See Perels, § 34; Hall, § 181; Boeck, No. 211; Dupuis, Nos. 81-84.

scheme ; but, on the other hand, they are unanimous that not every scheme for a voluntary fleet is to be rejected. Russia,<sup>1</sup> in fact, from 1887 possessed a voluntary fleet. France<sup>2</sup> had before the World War made arrangements with certain steamship companies according to which their mail-boats had to be constructed on plans approved by the Government, commanded by officers of the French navy and incorporated in the French navy at the outbreak of war. Great Britain from 1887 onwards entered into agreements with several powerful British steamship companies for the purpose of securing their vessels at the outbreak of hostilities ; and the United States of America in 1892 made similar arrangements with the American Line.<sup>3</sup>

Matters were brought to a climax in 1904, during the Russo-Japanese War, through the cases of *Petersburg* and *Smolensk*.<sup>4</sup> On July 4 and 6 of that year, these vessels, which belonged to the Russian volunteer fleet in the Black Sea, were allowed to pass the Bosphorus and the Dardanelles, which were closed<sup>5</sup> to men-of-war of all nations, because they were flying the Russian commercial flag. They likewise passed the Suez Canal under the commercial flag ; but, after leaving Suez, they converted themselves into men-of-war by hoisting the Russian war flag, and began to exercise over neutral merchantmen all the rights of supervision which belligerents can claim for their cruisers in time of war. On July 13, *Petersburg* captured the British steamer *Malacca* for alleged carriage of contraband, and put a prize crew on board for the purpose of navigating her to a Russian port. But the British Government protested ; the *Malacca* was released, and Russia agreed that *Petersburg* and *Smolensk* should no longer act as cruisers, and that all neutral vessels captured by them should be released.<sup>6</sup>

This case was the cause of the question of the conversion

<sup>1</sup> See Dupuis, No. 85.

<sup>2</sup> See Dupuis, No. 86.

<sup>3</sup> See Lawrence, § 201, and Dupuis, Nos. 87-88. On the whole question see Pradier-Fodéré, viii. Nos. 3102-3103 ; Fauchille, § 1304-1312 (1) ; Hyde, ii. §§ 706-708 ; Higgins, *War and the Private Citizen* (1912), pp. 113-165.

<sup>4</sup> See the details of the career of these vessels in Lawrence, *War*, pp. 205 *et seq.*

<sup>5</sup> See above, vol. i. § 197.

<sup>6</sup> On the controversial incident of the conversion of the *Ayesha*, a German schooner, in the Dutch Indies in November 1914, see Charteris in *B. Y.*, xviii. (1937) pp. 199-202.

of merchantmen into men-of-war being taken up by the Second Hague Conference in 1907, and dealt with in Convention VII.<sup>1</sup> This Convention, which was signed by all<sup>2</sup> the States represented at the conference, except the United States of America, China, San Domingo, Nicaragua, and Uruguay, comprised twelve articles; its more important stipulations were the following:

No converted vessel can have the status of a warship unless she is placed under the direct authority, immediate control, and responsibility of the Power whose flag she flies (Article 1). Such a vessel must, therefore, bear the external marks which distinguish the warships of her nationality (Article 2); the commander must be in the service of the State, must be duly commissioned, and his name must figure on the list of the officers of the military fleet (Article 3); and the crew must be subject to the rules of military discipline (Article 4). A converted vessel must observe the laws and usages of war (Article 5), and her conversion must as soon as possible be announced in the list of the ships of his military fleet by the belligerent concerned (Article 6).<sup>3</sup>

During the World War and the war which broke out with Germany in 1939<sup>4</sup> converted merchantmen were freely employed.<sup>5</sup>

<sup>1</sup> See Wilson in *A.J.*, ii. (1908) pp. 271-275; Lémonon, pp. 607-622; Higgins, pp. 312-321; Dupuis, *Guerre*, Nos. 48-58; Nippold, ii. pp. 73-84; Scott, *Conferences*, pp. 568-576; Higgins, *War and the Private Citizen* (1912), pp. 115-165.

<sup>2</sup> But was not ratified by all.

<sup>3</sup> As to defensively armed merchantmen see below, § 181a.

<sup>4</sup> Thus, for instance, in November 1939 the *Rawalpindi*, a British converted merchant-vessel, was sunk in a pitched naval encounter with the *Deutschland*, a German battle-ship.

<sup>5</sup> See the Opinion of Parker, Umpire, on the meaning of the phrase 'naval and military works and materials' in paragraph 9 of Annex I to Section I. of Part VIII. of the Treaty of Versailles with reference to defensively armed merchantmen, vessels under belligerent convoy, and requisitioned ships: United States and

Germany, Mixed Claims Commission: *A.J.*, xviii. (1924) p. 614; *Annual Digest*, 1923-1924, Case No. 221. And see the award of the same arbitrator of March 1929, in *The Kronprinz Wilhelm and Other Vessels*, on the meaning of the term 'merchant-vessel' with reference to auxiliary ships: *Annual Digest*, 1929-1930, Case No. 300. A merchant-vessel may become an auxiliary vessel by acting, even for limited purposes, on the orders of a man-of-war. In December 1939 the *Tacoma*, a German merchant-vessel, while in the Uruguayan port of Montevideo assisted the *Graf Spee*, a German battle-ship who subsequently scuttled herself, in transferring the officers and crew of the latter to Argentine vessels which took them to Buenos Aires in order that they might be treated as shipwrecked sailors and escape internment (see below, p. 595). The Uru-

The opinion, which largely prevailed before the World War, that by permitting the conversion of merchantmen into men-of-war privateering had been revived, is unfounded, for the rules of Convention VII. in no way abrogated the rule of the Declaration of Paris that privateering is and remains abolished. But the Convention was unsatisfactory because it did not settle the questions where conversion may be performed, and whether it was permissible to reconvert into a merchantman,<sup>1</sup> before the termination of the war, a vessel which during the war had been converted into a warship. The Powers could not come to an agreement on these two points, one party claiming that conversion could only be performed within a harbour of the converting Power, or an enemy harbour occupied by it, the other party defending the claim to convert on the high seas as well; and the preamble of Convention VII. stated expressly that the place where a conversion might be performed remained an open question. It was still open when the World War broke out, and Great Britain, which belonged to the party denying a right to convert on the high seas, at once made it known that if German vessels, after leaving American ports, were converted into men-of-war on the high seas, it would hold the United States Government responsible for resulting damage.<sup>2</sup> Those Powers which claim that conversion<sup>3</sup> must not take place on the high seas may still refuse to acknowledge the public character of any vessel which has been converted on the high seas, and may still uphold their view that a converted vessel may not alternately claim the character and the privileges of a belligerent man-of-war and a merchantman.

guayan Government considered that by acting in this manner the *Tacoma* had become an auxiliary war-vessel (see below, p. 566). See Uruguayan Blue Book concerning the *Admiral Graf Spee* and the *Tacoma* (English edition, 1940), pp. 49-81. See also as to auxiliary vessels Genet, §§ 68-70. And see *The Zafiro*, *Annual Digest*, 1925-1926, Case No. 161.

<sup>1</sup> For an interesting decision on conversion and reconversion see the decision of Parker, Arbitrator, of

March 1929, in the matter of *The Kronprinz Wilhelm and Other Vessels*: *Annual Digest*, 1929-1930, Case No. 300; *A.J.*, xxiii. (1929) pp. 673-693.

<sup>2</sup> See Garner, i. § 245, and *A.J.*, ix. (1915), Special Suppl., pp. 222-223.

<sup>3</sup> Concerning the question whether an enemy merchantman, captured on the high seas, may at once be converted into a warship, see below, § 185 (n.).

The  
Crews of  
Merchant-  
men.

§ 85. In a sense, the crews of merchantmen owned by subjects of a belligerent belong to its armed forces. For those vessels are liable to be seized by enemy men-of-war, and, if attacked for that purpose, they may defend<sup>1</sup> themselves, may return the attack, and eventually seize the attacking men-of-war. The crews of merchantmen become in such cases combatants, and enjoy all the privileges of the members of armed forces. But, unless attacked, they must not commit hostilities, and if they do so they are liable to be treated as criminals, just as are private individuals who commit hostilities in land warfare. Some writers<sup>2</sup> assert that, although merchantmen of the belligerents are not competent to exercise the right of visit, search, and capture towards neutral vessels, they may attack enemy vessels—merchantmen as well as public vessels—not merely for the purpose of defence, but even without having been previously attacked, and that, consequently, the crews must in such case enjoy the privileges due to members of the armed forces. This opinion is without foundation nowadays<sup>3</sup>; even in former times it was not generally recognised.<sup>4</sup>

In regard to the fate of the crews of captured merchant-

<sup>1</sup> *The Catharina Elizabeth* (1804) 5 C. Rob. 232. See Wheaton, § 528; Twiss, ii. § 97; Phillimore, iii. § 340; Hall, § 182; American Naval War Code, Article 10; Bordwell, p. 236; Fiore, *Code*, No. 1698. This rule had not been contested until shortly before the outbreak of the World War; but see now below, § 181 (n.); Oppenheim and Triepel in *Z.V.*, viii. (1914) pp. 154-169, 378-406; Higgins, *Armed Merchantships* (1914) and *Defensively Armed Merchantships, etc.* (1917); Wehberg, pp. 66, 256-258, 283-286; Smith, *The Destruction of Merchantships under International Law* (1917), pp. 17-21; Anderson and Stowell in the *A.S. Proceedings*, xi. (1917) pp. 11-23; Garner, i. §§ 250-264.

<sup>2</sup> See Wheaton, § 357; Taylor, § 496; Walker, p. 135, where his view differs from that expressed earlier in Walker, *Science*, p. 268; and *International Law Notes*, iii. p. 51. From Hyde, ii. § 703, it seems that the official American view favours the opinion expressed in the text;

he points out that the mere fact that prizes taken by a non-commissioned ship have been condemned in courts of prize does not involve the proposition that no principle of International Law was violated by such captures: see also Halleck (1861), pp. 388-391, on the American cases.

<sup>3</sup> See below, § 181, and Hall, § 183, and Higgins, *War and the Private Citizen*, pp. 126-129. See Bellot's criticism of this passage in *Grotius Society*, vii. (1922) pp. 43-57; he lays stress upon the judgment of Story J. in *Brown v. United States* (1814) 8 Cranch at p. 131. However, although any opinion of Story J. carries weight, he was in a minority in this case, and his remarks were *obiter*; see also opinion of Story J. in *The Nerise* (1815) 9 Cranch at p. 449, where, however, he was again in a minority.

<sup>4</sup> See Vattel, iii. § 226, and G. F. Martens, ii. § 289. As regards the case of Captain Fryatt see below, § 181.

men, a distinction is to be made according to whether, or not, a vessel has defended herself against a legitimate attack. In the first case, members of the crew become prisoners of war, for by legitimately taking part in the fighting they have become members of the armed forces of the enemy.<sup>1</sup> In the second case, Articles 5 to 7 of Convention XI. of the Second Peace Conference enacted the following rules<sup>2</sup>:

(1) Such members of the crew as are subjects of neutral States may not be made prisoners of war.

(2) The captain and officers who are subjects of neutral States may only be made prisoners if they refuse to give a promise in writing not to serve on an enemy ship while the war lasts.

(3) The captain, officers, and such members of the crew as are enemy subjects may only be made prisoners if they refuse to give a written promise not to engage, while hostilities last, in any service connected with the operations of war.

(4) The names of all the individuals retaining their liberty under parole must be notified by the captor to the enemy, who is forbidden to employ them knowingly in any service prohibited by the parole.

However, the provision that members of the crew who were enemy subjects might only be made prisoners if they refused to give parole was *ipso facto* modified by the practice followed during the World War, according to which all enemy civilians of military age could be prevented from returning home, and could be interned. Accordingly, all the belligerents interned the enemy crews of captured enemy merchant-vessels.<sup>3</sup>

§ 86. The privileges of members of armed forces cannot be claimed by members of the armed forces of a belligerent who go over to the forces of the enemy and are afterwards captured by the former. They may be, and always are, treated as criminals. And the same is valid with regard to traitorous subjects of a belligerent who, without having

Deserters  
and  
Traitors.

<sup>1</sup> This follows indirectly from Article 8 of Convention XI. <sup>3</sup> As to neutral members of such crews see Hyde, § 773 (n.).

<sup>2</sup> See below, § 201.

been members of his armed forces, fight in the armed forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished.<sup>1</sup>

## VII

### ENEMY CHARACTER

Grotius, iii. c. 4, §§ 6, 7—Bynkershoek, *Quaestiones Juris publici*, i. c. 3 *in fine*—Hall, §§ 167-175—Lawrence, §§ 151-159—Westlake, ii. pp. 163-176—Phillimore, iii. §§ 82-85—Twiss, §§ 152-162—Taylor, §§ 468, 517—Walker, §§ 39-43—Wharton, iii. §§ 352-353—Wheaton, §§ 324-341—Hershey, Nos. 433-436—Moore, vii. §§ 1185-1194—Geffcken in *Holtzendorff*, iv. pp. 581-588—Ullmann, § 192—Nys, iii. pp. 70-84—Pradier-Fodéré, viii. Nos. 3166-3175—Fauchille, §§ 1384-1394—Despagnet, Nos. 650-653<sup>a</sup>—Calvo, iv. §§ 1932-1952—Fiore, iii. Nos. 1432-1436, and *Code*, Nos. 1723-1731—Boeck, Nos. 156-190—Dupuis, Nos. 92-149, and *Guerre*, Nos. 59-73—Lémonon, pp. 426-467—Higgins, p. 593—Nippold, ii. pp. 40-54—Wehberg, pp. 178-194—Garner, i. §§ 144, 155-161, 134-135, 121-138—*Strupp*, *Wört.*, i. 301-307—Verzijl, §§ 189-343—Hyde, ii. §§ 783-796—Colombos, §§ 42-93—Garner, *Prize Law*, Nos. 275-383; Baty, pp. 170-190—Keith's *Wheaton*, pp. 672-700—Scott, *Conferences*, pp. 541-555—Frankenbach, *Die Rechtsstellung von neutralen Staatsangehörigen in kriegführenden Staaten* (1910)—Hirschmann, *Das internationale Prisenrecht* (1912), § 7—Baty in the *Journal of Comparative Legislation*, New Ser., ix. part i. (1908) pp. 157-166, and Westlake, *ibid.*, part ii. (1909) pp. 265-268—Baty in the *Juridical Review*, xxi. (1909) pp. 1-11—Oppenheim in the *Law Quarterly Review*, xxv. (1909) pp. 372-384—Visscher, *ibid.*, xxxi. (1915) pp. 289-298—Baty in *A.J.*, xv. (1921) pp. 198-231 and 334-408—Lewis in *B.Y.*, 1923-1924, pp. 60-77.

On  
Enemy  
Character  
in general.

§ 87. Since the belligerents, for the realisation of the purpose of war, are entitled to take many kinds of measures against enemy persons and enemy property, it must be determined what persons and what property are vested with enemy character. Now, it is, generally speaking, correct to say that, whereas the subjects of a belligerent and their property bear enemy character, the subjects of a neutral State and their property do not bear enemy character. This rule has, however, important exceptions. For under certain circumstances and conditions enemy persons and the property of enemy subjects may not bear, and, on the other hand, subjects of a neutral State and their property may

<sup>1</sup> See below, § 222; Hall, § 190; *Land Warfare*, § 36.

bear, enemy character. And it is even possible for a subject of a belligerent to bear for certain purposes enemy character as between himself and his home State.

The question of enemy character is, however, to a great extent unsettled, since on many points connected with it no universally recognised rules of International Law are in existence. Before the World War, British and American courts had worked out a body of precise and clear rules, but the practice of other countries, and especially of France, had followed different lines. The Second Hague Conference of 1907 produced three articles of minor importance on the matter (Articles 16, 17, and 18 of Convention V.), which were accepted by all the signatory Powers except Great Britain, who, upon signing the Convention, entered a reservation against them. The Declaration of London comprised a number of rules which, apart from two important points, offered a common basis for the practice of all maritime States.<sup>1</sup> But neither the Hague Conference nor the Naval Conference of London reached a compromise upon the old controversies as to whether nationality exclusively, or domicile also, should determine the neutral or enemy character of individuals and their goods, and whether or not neutral vessels acquire enemy character by embarking in time of war, with the permission of the enemy, upon such trade with the latter as was closed to them in time of peace (Rule of 1756).<sup>2</sup>

When the World War broke out, these questions were still open; moreover, Great Britain and certain other belligerents had not ratified Hague Convention V., and no Power had ratified the Declaration of London. States fell back upon their divergent practices, and even these underwent far-reaching changes under the stress of new circumstances. The war which broke out in 1939 lent emphasis to these developments.<sup>3</sup>

<sup>1</sup> At the first glance it would seem that only the four articles—57 to 60—of Chapter VI. headed 'Enemy Character' dealt with the subject, but a closer examination shows that Article 46, relating to a certain kind of unneutral service, Articles 55 and

56, dealing with transfer to a neutral flag, and, lastly, Article 63, relating to forcible resistance to the right of visitation, were also concerned with enemy character.

<sup>2</sup> See below, § 289.

<sup>3</sup> See below, pp. 220, 222.



For the consideration of enemy character in detail, it is convenient to distinguish between individuals, corporations, vessels, goods, the transfer of enemy vessels, and the transfer of goods *in transitu* at sea.

Enemy  
Character  
of In-  
dividuals.

§ 88. The general rule with regard to *individuals* is that subjects of the belligerents bear enemy character, whereas subjects of neutral States do not. In this sense Article 16 of Convention V. stipulated: 'The nationals of a State which is not taking part in the war are considered to be neutral.' These neutral individuals can, however, lose their neutral character and acquire enemy character in several cases, and subjects of the belligerents can in other cases lose their enemy character:

(1) Since relations of peace obtain between each of the belligerents and neutral States, the subjects of the latter can, by way of trade and otherwise, render many kinds of services to either belligerent without thereby losing their neutral character. On the other hand, if they enter the armed forces of a belligerent, or do certain other things in his favour, or commit hostile acts against a belligerent, they acquire enemy character. All measures that are allowed during war against enemy subjects are likewise allowed against such subjects of neutral Powers as have thus acquired enemy character. For instance, during the World War hundreds of subjects of neutral States, who were fighting in the ranks of the belligerents, were captured and retained as prisoners until the end of the struggle. But such individuals must not be more severely treated than enemy subjects, and, in especial, no punitive measures are allowed against them.<sup>1</sup>

Subjects of neutral States not inhabiting the territory of the enemy, or any territory militarily occupied by him,<sup>2</sup> do not, however, acquire enemy character by furnishing supplies or making loans to the enemy, provided the supplies do not come from the enemy territory, or any territory occupied by him.<sup>3</sup>

<sup>1</sup> Article 17 of Convention V. See above, § 82a.

<sup>2</sup> See *Bentzen v. Boyle* (*Thirty Hogsheads of Sugar*) (1815) 9 Cranch

191; Scott, *Cases*, 680; and Hall, 8th ed., p. 604 (n.).

<sup>3</sup> Article 18 (a) of Convention V.

Article 18(b) of Convention V. laid down a new rule<sup>1</sup> that subjects of neutral States who render services to the enemy in matters of police and administration, likewise do not acquire enemy character. This stipulation must, however, be read with caution. It can only mean that such individuals do not lose their neutral character to a greater degree than other subjects of neutral States resident on enemy territory; it cannot mean that they are in every way to be considered and treated like subjects of neutral States not residing on enemy territory.

The acts by which subjects of neutral States lose their neutral, and acquire enemy, character need not necessarily be committed after the outbreak of war. They can, even before the outbreak of war, identify themselves to such a degree with a foreign State that, with the outbreak of war against that State, enemy character devolves upon them *ipso facto*, unless they at once sever their connection with such State. This, for instance, is the case when a foreign subject, in time of peace, enlists in the armed forces of a State and continues to serve after the outbreak of war.

(2) From the time when International Law made its appearance down to our own day, no difference has been made by a belligerent between the treatment accorded to subjects of the enemy and to subjects of neutral States inhabiting the enemy country. Thus Grotius<sup>2</sup> teaches that foreigners must share the fate of the population living on enemy territory, and Bynkershoek<sup>3</sup> distinctly teaches that foreigners residing in enemy country bear enemy character. British<sup>4</sup> and American practice asserts, therefore, that

<sup>1</sup> Great Britain entered a reservation against Articles 16, 17, and 18 of Convention V.; moreover, she has not ratified Convention V. But Articles 16, 17, and 18 (a)—not 18 (b)—enacted only such rules as were always customarily recognised, unless Article 16 be interpreted so as to prevent a belligerent from considering subjects of neutral States inhabiting the enemy country as bearing enemy character. Different, however, is Article 18 (b), which created an entirely new rule, for, nobody had

previously doubted that the members of the police force and the administrative officials of the enemy bore enemy character whether or no they were subjects of the enemy State.

<sup>2</sup> iii. c. 4, §§ 6, 7.

<sup>3</sup> *Quaestiones Juris publici*, i. c. 3 in fine.

<sup>4</sup> See *The Harmony* (1800) 2 C. Rob. 322; *The Johanna Emilie*, otherwise *Emilia* (1854) Spinks 12; *The Baltica* (1857) 11 Moore, P.C. 141. See below, § 90.

foreigners, whether subjects of the belligerents or of neutral States, acquire enemy character by being domiciled (*i.e.* resident) in enemy country, because they have thereby identified themselves with the enemy population, and contribute, by paying taxes and the like, to the support of the enemy Government. For this reason, all measures which may legitimately be taken against the civil population of the enemy territory may likewise be taken against them, unless they withdraw from the country, or are expelled therefrom. It must, however, be remembered that they acquire enemy character *in a sense and to a certain degree only*; their enemy character is not so intensive as that of enemy subjects resident on enemy territory. Such of them as are subjects of neutral States do not, therefore, lose the protection of their home State against arbitrary treatment inconsistent with the laws of war<sup>1</sup>; and such of them as are subjects of the other belligerent are handed over to the protection of the embassy of a neutral Power. However that may be, they are not exempt from requisitions and contributions; from the restrictions which an occupant imposes upon the population in the interest of the safety of his troops and the success of his military operations; from punishments for hostile acts committed against the occupant; or from being taken into captivity, if exceptionally necessary. This treatment of foreigners resident on occupied enemy territory is generally recognised as legitimate by theory<sup>2</sup> and practice.

<sup>1</sup> As to the destruction of the property of foreign subjects in the course of military operations against insurgents see the *Luzon Sugar Refining Co.'s Claim in A.J.*, xx. (1926) p. 391; *Annual Digest*, 1925-1926, Case No. 164. See also Eagleton, *The Responsibility of States in International Law* (1928), pp. 138-156, and Silvanie, *Responsibility of States for Acts of Unsuccessful Insurgents* (1939).

<sup>2</sup> See Albrecht, *Requisitionen von neutralem Privateigentum, etc.* (1912), pp. 13-15, and Hirsch, *Die rechtliche Stellung der Angehörigen neutraler Staaten* (1914), pp. 80-84. See also below, § 170. The Italian Neutrality Regulations of 1938 provide that in case of bombardment neutral property and the official premises of neutral

diplomatic or consular representatives are to be protected so far as possible (Article 47). Neutral subjects must be allowed to leave if there are no important reasons which make this impossible (Article 48). The proposal, of Germany, made at the Second Hague Conference, to agree upon rules which would have stipulated for a more favourable treatment of subjects of neutral States resident on occupied enemy territory was, therefore, rejected. Not even France supported the German proposals, although, according to the French conception then prevailing, foreigners residing in enemy country did not acquire enemy character, and the German proposals were only a logical consequence of it. See Garner, i.

(3) Since enemy subjects who reside in neutral countries, or are allowed to remain resident on the territory of the other belligerent, have to a great extent identified themselves with the local population and are not under the territorial supremacy of the enemy, they lost their enemy character according to the British and American practice which prevailed before the World War,<sup>1</sup> although according to French practice they did not, a difference which bore upon many points, especially upon the character of goods.<sup>2</sup>

During the World War, however, Great Britain abandoned her former practice in many respects. As regards enemy subjects resident in neutral States, the Trading with the Enemy (Extension of Powers) Act, 1915,<sup>3</sup> authorised His Majesty by proclamation to prohibit all persons in the United Kingdom from trading with any persons in foreign countries whose *enemy nationality* or *enemy association* made such prohibition expedient, and constituted such trading the offence of trading with the enemy. Statutory lists (so-called 'black lists') were issued under this Act, which proscribed a large number of persons and firms in various States then neutral.<sup>4</sup> But trade with enemy subjects resident in neutral States whose names were not on these lists was not illegal.<sup>5</sup> On the outbreak of the war with

§ 144, who points out that during the World War French trading with the enemy legislation abandoned this conception.

This French conception of enemy character dated from the judgment of the *Conseil des Prises* in the case of *Le Hardy contre La Voltigeante* (1802)—see 1 Pistoye et Duverdy, 321—which laid down the rule that neutral subjects residing in enemy country do not lose their neutral character, and enemy subjects residing in neutral countries do not lose their enemy character. The French decree of September 1, 1939, relating to the sequestration of enemy property excludes from the operation of the decree enemy nationals or enemy corporations in neutral countries unless they are included in the 'official list of enemies' published by the Ministry of Foreign Affairs. See *Parfums Tosca v. Peschaud*, Dalloz,

*Recueil Hebdomadaire, Jurisprudence*, 1940, p. 11.

<sup>1</sup> See *The Postilion* (1779) Hay and Marriot 245; *The Danous* (1802) 4 C. Rob. 255 (n.); *The Venus* (1814) 8 Cranch 253.

<sup>2</sup> See below, § 90.

<sup>3</sup> 5 & 6 Geo. V. c. 98.

<sup>4</sup> As to the resulting controversy with the United States see Parl. Papers, Misc. No. 11 (1916), Cmd. 8225, and No. 36 (1916), Cmd. 8353, and Garner, i. §§ 156-160.

<sup>5</sup> See, however, the Trading with the Enemy (China, Siam, Persia, and Morocco) Proclamation, 1915; *Salti et fils v. H.M. Procurator-General* [1919] A.C. 968; 3 B. and C.P.C. 374. And see note on commercial domicile to § 90, below.

When the United States entered the war, she also adopted a policy similar to the new British policy. See the American Trading with the Enemy

Germany in 1939 the Trading with the Enemy Act, 1939,<sup>1</sup> provided a statutory definition of 'enemy' as meaning, with regard to individuals, 'any individual resident in enemy territory.'<sup>2</sup> While the Act thus adopts the common law test of residence, it apparently leaves aside the other common law test of commercial residence or of 'carrying on business.'<sup>3</sup> However, this definition must be read in conjunction with: (a) section 1 (3) of the Act by which 'any reference in this section to an enemy shall be construed as including a reference to a person acting on behalf of an enemy,' and (b) with the provision that the Board of Trade may direct that any person specified in the order shall be deemed an enemy for the purposes of the Act. Successive 'black lists' were issued during the war under the latter provisions. The Act provided expressly that no person shall be deemed an enemy for the sole reason that he is an enemy subject.<sup>4</sup> At the same time French legislation departed from the exclusive test of nationality.<sup>5</sup>

Enemy  
Character  
of Cor-  
porations.

§ 88a. There are no rules of International Law to determine whether a corporation possesses enemy character, and the question was much debated at the outbreak of the World War.<sup>6</sup> The rapid development of joint-stock enter-

Act of 1917, § 2 (c), in *A.J.*, xii. (1918), Suppl., p. 27; Garner, i. §§ 144, 161. And see the same, §§ 72-74, on the American legislation.

<sup>1</sup> 2 & 3 Geo. VI. c. 89, s. 2.

<sup>2</sup> The same section also defines as 'enemy' any 'State, or Sovereign of a State, at war with His Majesty.'

<sup>3</sup> See below, p. 226.

<sup>4</sup> The expression 'enemy subject' was defined in the Trading with the Enemy Act, 1939 (s. 15), and in the Import, Export, and Customs Powers (Defence) Act, 1939 (2 & 3 Geo. VI. c. 69, s. 8), as meaning: (1) an individual who, not being either a British subject or a British protected person, possesses the nationality of a State at war with Great Britain; (2) a body of persons constituted or incorporated in, or under the laws of, any such State. But the latter—exception 2—are a category of persons who, according to both these Acts, come within the definition of 'enemy.' This apparent contradiction is prob-

ably due to a mistake in drafting.

<sup>5</sup> The French Decree of September 1, 1939, defined as enemies all persons present or habitually residing in enemy territory and all enemy subjects interned in French territory: *J.O.* of September 4.

<sup>6</sup> For the literature on the nationality of corporations see above, vol. i. § 293 (n.), and—with special reference to the time of war—the following: McNair in *B.Y.*, 1923-1924, pp. 44-59, and bibliography on p. 59; Wahl, *Situation des sociétés de nationalité ennemie ou composées de sujets ennemis*, in *Journal des Sociétés*, xvi. pp. 153 et seq.; Gain, *La nationalité des sociétés avant et depuis la guerre* (1924); Verzijl, §§ 294-302; Garner, *Prize Law*, Nos. 376-383; Colombos, §§ 50, 59; Isay, *Die privaten Rechte und Interessen im Friedensvertrag*, 3rd ed. (1923), pp. 44-46, 49-51; Held in *Strupp, Wört.*, i. 305-306; Neumeyer in *Z.V.*, xii. (1922-1923) pp. 261-275.

prise had taken little account of war-like conditions, and the principle of company law, that a corporation is an entity distinct from its members, had not yet come into serious conflict with them.

British opinion was generally agreed, on the authority of *Janson v. Driefontein Consolidated Mines*,<sup>1</sup> that a corporation incorporated in an enemy country had enemy character. But it was doubtful whether a corporation carrying on business<sup>2</sup> in an enemy country, but not incorporated there, also possessed enemy character, and, further, whether a corporation neither incorporated nor carrying on business in an enemy country could under any circumstances acquire that character. The first of these questions at once arose in connection with trading with the enemy,<sup>3</sup> and early proclamations, after some confusion of thought, settled down to the view that enemy character attached to companies 'wherever incorporated, carrying on business in an enemy country, or in any territory for the time being in hostile occupation.'<sup>4</sup> The second question was carried to the House of Lords in the *Daimler* case,<sup>5</sup> where it was laid down that a company assumes enemy character 'if its agents or the persons in *de facto* control of its affairs are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. . . . The character of individual shareholders cannot of itself affect the character of the com-

<sup>1</sup> [1902] A.C. 484, at p. 497.

<sup>2</sup> As to the meaning of 'carrying on business' see *Central India Mining Co. v. Soc. Coloniale Anversoise* [1920] 1 K.B. 753.

<sup>3</sup> See below, § 101.

<sup>4</sup> See McNair, *Legal Effects of War* (1920), p. 122, and the Proclamation of September 14, 1914. As to companies incorporated in territory occupied by the enemy see *Soc. An. Belge des Mines d'Aljustrel v. Anglo-Belgian Agency* [1915] 2 Ch. 409; *Central India Mining Co. v. Soc. Coloniale Anversoise* [1920] 1 K.B. 753; *In re Deutsche Bank* [1921] 2 Ch. 30. For an interesting innovation see the Decree issued in October 1939 by the Swiss Federal Council,

according to which a company incorporated under the laws of Switzerland can, on application, remove its seat of administration in case of war to any place in which the Government of Switzerland may have its seat. The result of the Decree was probably that should Switzerland be occupied by enemy forces and should the Swiss Government in consequence remove its seat abroad, the corporations in question would not automatically become 'enemy subjects' in the meaning of the Act. For the text of the Decree see *Bulletin de l'Institut Juridique International*, 42 (1940), p. 79.

<sup>5</sup> *Daimler Co. Ltd. v. Continental Tyre and Rubber (Great Britain) Co. Ltd.* [1916] 2 A.C. 307; and *In re Badische Co.* [1921] 2 Ch. 331.

pany.'<sup>1</sup> The Trading with the Enemy Act, 1939,<sup>2</sup> adopted both the test of incorporation and that of control. Section 2 of the Act included within the definition of enemy: (a) any body of persons (whether corporate or unincorporate), whatever its place of business, if and so long as the body is controlled by a person who is an enemy<sup>3</sup> within the meaning of the Act,<sup>4</sup> and (b) any body of persons constituted or incorporated in, or under the laws of, a State at war with Great Britain.

The French courts, confronted with the same difficulty, held during the World War that, in order to determine enemy character, they had the right 'to go to the bottom of things and ascertain whether the company was a French company in reality or such only in appearance.'<sup>5</sup> The French Decree of September 1, 1939, expressly adopted the tests both of registration and control.

American practice during the World War, while also attaching enemy character to companies incorporated, or carrying on business, in an enemy country,<sup>6</sup> did not attribute such character to a company neither incorporated nor doing business there.

<sup>1</sup> At p. 345. In *The Poona* (1915) 1 B. and C.P.C. 275, the Prize Court had reached a different conclusion. But that decision was prior to the decision of the House of Lords in the *Daimler* case. See also *The Polzeath* [1916] P. 117. Care ought to be taken not to confuse the test of enemy character of corporations as laid down in the *Daimler* case with the question of nationality of corporations. This point is brought out very clearly by Beckett in *Grotius Society*, xvii. (1932) pp. 181-187. See also Marburg, *Staatsangehörigkeit und feindlicher Charakter juristischer Personen* (1927) and Farnsworth, *The Residence and Domicile of Corporations* (1939). In general there has been in the post-war period a tendency to regard the control test as a transient measure conditioned and justified by reasons of national safety and the assumption that the enemy nationality of shareholders must affect the character and the policy of the corporation. See *Standard Oil Company Tankers* case between the Reparation Commission and the United States: *B.Y.*, 1927,

p. 156; *A.J.*, xxii. (1928) p. 404; *Annual Digest*, 1925-1926, Case No. 353; *Wilkens v. Lagarde* (French Court of Cassation), *ibid.*, Case No. 355.

<sup>2</sup> 2 & 3 Geo. VI. c. 80, s. 2.

<sup>3</sup> The 'enemy' may be a body of persons.

<sup>4</sup> See above, p. 220.

<sup>5</sup> *Société Conserve Lenzbourg*, cited by Garner, i. § 153; 42 *Chunet* (1916), p. 1164; and *The Italia, R.G.*, xxvii. (1920), *Jurisprudence*, p. 66. Contrast, however, *Czar Nicolai II.*, Fauchille, *Jur. fr.*, i. p. 10, the *Flamanville*, *ibid.*, p. 113, and *C. Ferd. Laeisz*, *ibid.*, i. 202, discussed by Verzijl, § 298.

<sup>6</sup> See § 2 (a) of the American Trading with the Enemy Act, 1917, and *Fritz-Schultz Co. v. Raimex Co.* (1917) 164 N.Y.S. 454, cited by Garner, i. § 154. See also *Stumpf v. Scheiber Brewing Co.* (1917) 242 Fed. 80, also cited by Garner. Hyde, (ii. § 796) appears to regard the application of the *Daimler* test as 'no abuse of a belligerent right.' See also Norem in *A.J.*, xxiv. (1930) pp. 310-336.

§ 89. The general rule before the World War with regard to vessels was that *prima facie* their character is determined by their flag. This is still the test in the case of a vessel sailing under the enemy flag<sup>1</sup>; and whatever may be the nationality of her owner—whether a subject of a neutral State, or of either belligerent—she bears enemy character. But to the converse proposition, namely, that an enemy-owned vessel which sails under a neutral flag bears neutral character, the following exceptions must be mentioned:

Enemy  
Character  
of Vessels.

(1) Even before the World War, the flag of a neutral State was the deciding factor only when the vessel was legitimately sailing under it<sup>2</sup>; should it be found that a vessel sailing under the flag of a certain neutral State had, according to the Municipal Law of such State, no right to fly the flag she showed, the real character of the vessel had to be determined in order to decide whether or not she bore enemy character.

(2) As was provided by Article 46 of the unratified Declaration of London<sup>3</sup> (which in this respect was in substance declaratory of existing law), a neutral merchantman acquired enemy character by taking a direct part in the hostilities,<sup>4</sup> by being under the orders or control of an agent placed on board by the enemy Government, by being in the exclusive employment of the enemy Government, and by being at the time exclusively intended either for the transport of troops or for the transmission of intelli-

<sup>1</sup> It makes no difference that the owner is the subject of a neutral non-littoral State without a maritime flag (see Barcelona Convention of April 20, 1921, as to the right of a non-littoral State to have a maritime flag, Treaty Series No. 29, 1923; *A.J.*, xviii. (1923) pp. 167-168), and that the vessel is, therefore, compelled to fly the flag of a maritime State: if the flag the vessel flies be the enemy flag, she bears enemy character. Nor, if a vessel flies an enemy flag, will she escape condemnation by being mortgaged to subjects of a non-enemy State. See *The Marie Glaeser* (1914) 1 B. and C.P.C. 38; [1914] P. 218. The British Prize Court disregards mort-

gages and liens on enemy vessels, which accords with the practice of many other Prize Courts—see Verzijl, §§ 209-210; Garner, *Prize Law*, Nos. 293-301; and Colombos, §§ 64-69.

<sup>2</sup> See Verzijl, §§ 200-207; Garner, *Prize Law*, Nos. 289-292; Balladore Pallieri, pp. 275-286; Rienow, *The Test of the Nationality of a Merchant Vessel* (1937), pp. 117-153; Genet, ii. pp. 663-680.

<sup>3</sup> See below, § 410.

<sup>4</sup> Whether the crew of a neutral ship taking a direct part in hostilities can only be made prisoners of war, or whether they can be punished as war criminals, does not seem to be settled. Schramm, *Das Prisenrecht* (1913), p. 358, adopts the second alternative.



gence for the enemy. The act by which a neutral vessel acquired enemy character need not necessarily have been committed *after* the outbreak of war, for she could, even *before* the outbreak of war, to such a degree identify herself with a foreign State that, with the outbreak of war against such State, enemy character devolved upon her *ipso facto*, unless she severed her connection with it. This was, for instance, the position of a foreign merchantman which in time of peace had been hired by a State for the transport of troops or of war material, and continued to carry out her contract in spite of the outbreak of war.<sup>1</sup>

(3) As was provided by Article 63 of the unratified Declaration (here again declaratory of existing law), a neutral merchantman acquired enemy character *ipso facto* by forcibly resisting the legitimate exercise of the right of visit and capture.<sup>2</sup>

(4) According to British practice—adopted by America and Japan<sup>3</sup>—neutral merchantmen likewise acquired enemy character if they violated the so-called Rule of 1756<sup>4</sup> by engaging in time of war in a trade which the enemy prior to the war reserved exclusively for merchantmen sailing under his own flag. The unratified Declaration of London neither rejected nor accepted this Rule of 1756, for Article 57 stipulated expressly that this case remained unsettled.

These exceptions were admitted before the World War, and are still valid.

(5) Some British and American authority existed, even before the World War, for yet another exception to the rule

<sup>1</sup> In the case of *The Kow-shing*, which has lost its former importance, a British ship, just before the outbreak of the Chino-Japanese War, was hired by the Chinese Government to transport Chinese soldiers and ammunition to Korea. She was met in Korean waters by the Japanese fleet, stopped, visited, and ordered to follow a Japanese cruiser. Although the British captain was ready to comply, the Chinese on board would not allow it. Thereupon the Japanese opened fire and sank the vessel. As then hostilities could be commenced without a

previous declaration of war, the action of the Japanese was in accordance with the rules of International Law. See Hall, § 168\*; Takahashi, *Cases on International Law during the Chino-Japanese War* (1899), pp. 27-51; Holland, *Studies*, pp. 126-128.

<sup>2</sup> See below, § 422, and Hall, § 275.

<sup>3</sup> See *The Montara* in Takahashi, p. 633, and Hurst, ii. p. 403. On the other hand, the Russian Supreme Prize Court rejected the Rule of 1756 in *The Thea*; see Hurst, i. p. 96.

<sup>4</sup> See below, § 289, and Higgins, *War and the Private Citizen* (1912), pp. 169-192.

of the conclusiveness of a neutral flag lawfully flown; namely, that this test would give way in so far as the owners of the vessel, or some of them, could be proved to have enemy character.<sup>1</sup>

However, Article 57 of the unratified Declaration of London (which makes the test of the lawful flag conclusive except in cases of transfer from one flag to another) was put into force<sup>2</sup> by Great Britain at the outbreak of war, and this for a time precluded any inquiry into the character of the owners of the vessel. France also put Article 57 into force; but the plans adopted by Germany for buying neutral vessels and sailing them under a neutral flag<sup>3</sup> soon convinced both Great Britain and France that it must be abandoned. Accordingly, by Order in Council dated October 20, 1915, Great Britain abrogated this article, and declared that for the future British Prize Courts would follow the former British practice.<sup>4</sup> France made a similar change of policy.<sup>5</sup>

<sup>1</sup> See Hall, § 168 (n.); Holland, *Prize Law*, § 19, No. 3; and the following cases cited by Hall, § 168 (n.): *The Susa* (1799) 2 C. Rob. 251; *The Zulema* (1809) 1 Acton 14; *The Industrie* (1854) 4 Spinks 54; *The William Bagaley* (1866) 5 Wall. 377, Scott, Cases, 690; *The Schooner Napoleon*, Blatch 357. See also *The Vrow Elizabeth* (1803) 5 C. Rob. 2, at p. 4, and *The Primus* (1854) Spinks 48.

<sup>2</sup> As to the legal operation in British prize law of the Order in Council of August 20, 1914 (*London Gazette*, August 21, 1914), which put the Declaration of London into force with certain modifications, see *The Proton* (1918) 3 B. and C.P.C. 125; [1918] A.C. 578. See also Garner, *Prize Law*, No. 281.

<sup>3</sup> See the cases of the Wagner ships (*American Transatlantic Company, owners of the steamships Kankakee, Hocking, and Genesee, v. His Majesty's Procurator-General*) (1917) reported on appeal in *The Times* of July 24, 1920), and Garner, i. § 135. A German financier in the winter of 1914 and the following year purchased eleven neutral ships through neutral agents, and made an arrangement through these agents with Wagner, an American subject of German origin, under which Wagner

was to float an American company to sail the vessels and secure for them American registry. Almost as soon as American registry was obtained, however, Great Britain and France (see above) abandoned Article 57 of the Declaration of London, and several of the ships were captured and condemned as being German-owned, though flying the American flag.

<sup>4</sup> See Garner, i. § 134, *Prize Law*, Nos. 275-279, and Verzijl, §§ 211-214; and *The Kara Deniz* (1922) 91 L.J. (P.C.) 195; 3 B. and C.P.C. 1070; B.Y., 1923-1924, p. 185 (ship under Turkish, and, later, Persian flag, Persian owner with Turkish domicile, ship condemned).

<sup>5</sup> See Garner, *ibid.*, who cites the French case of *The Willkommen*, and compare Verzijl, § 216, and Colombos, § 51. Article 20 of the French Instructions of 1934 describes as having enemy character any vessel which: (1) flies an enemy flag; (2) is not entitled to fly the French or a neutral flag; (3) which has been transferred from an enemy to a neutral flag in circumstances justifying her capture; (4) whose owner has enemy character; (5) which is controlled or operated for the benefit of an enemy State or a person having enemy character.

The British Prize Court considered the character of a German-owned vessel flying a British flag in the case of *The St. Tudno*,<sup>1</sup> and a neutral flag in the case of *The Hamborn*,<sup>2</sup> and it was held that 'it is a settled rule of prize law based on the principles upon which prize courts act, that they will penetrate through and beyond forms and technicalities to the facts and realities. This . . . means that . . . the owners are bound by the flag which they have chosen to adopt, but captors as against them are not so bound.'<sup>3</sup>

The following rules apply to all neutral vessels which have acquired enemy character:—(a) all enemy goods on board may be confiscated, even if, when they were first shipped, the vessels were neutral; (b) all goods on board will be presumed to be enemy goods, and the owners of neutral goods will have to prove their neutral character; (c) the rules concerning the sinking of neutral prizes do not apply, because these vessels are now enemy vessels.

Enemy  
Character  
of Goods.

§ 90. It is an old customary rule<sup>4</sup> that all goods found on board an enemy merchantman are presumed to be enemy goods unless the contrary is proved by neutral owners. It is, further, generally recognised that the enemy character of goods depends upon the enemy character of their owners. As, however, no universally recognised rules exist as to the enemy character of individuals, there are no universally recognised rules as to the enemy character of goods. The unratified Declaration of London did not purport to lay down any, because the Powers could not reach agreement.

(1) *Commercial Domicile*.<sup>5</sup>—Since, according to British and

<sup>1</sup> (1916) 2 B. and C.P.C. 273; [1916] P. 291.

<sup>2</sup> (1917) 3 B. and C.P.C. 80, 379; [1918] P. 19; [1919] A.C. 993.

<sup>3</sup> 3 B. and C.P.C. 80, at p. 83; [1918] P. at p. 22. See Dana's note in Wheaton, § 340: 'The State may, if it chooses, hold the ship concluded by the fact of having used the flags and papers she has knowingly carried, if that result is favorable to the interests of the State. This is usually done in war, and may be done in peace. It is simply the application to the inquiry of a rule of conclusive presumption or *estoppel* against a party.

Whether it shall be enforced depends on State policy. The vessel cannot claim the application of the rule in its own favor.' On the case of *The Presidente Mitre* see Garner, i. § 135.

<sup>4</sup> See *The Roland* (1915) 1 B. and C.P.C. 188, and the French case of *The Porto* (1915) R.G., xxiii. (1916), *Jurisprudence*, p. 86, and Garner, i. § 113. The rule was embodied in the unratified Declaration of London.

<sup>5</sup> 'Commercial domicile' or 'trade domicile' is not necessarily the same as a man's 'civil domicile.' Dicey (*Conflict of Laws*, 2nd ed., Appendix, note 7, p. 742) defines commercial

American practice, domicile in enemy country makes an individual bear enemy character,<sup>1</sup> all goods belonging<sup>2</sup> to individuals domiciled in enemy country are enemy goods, and all goods belonging to individuals not resident in enemy country are, as a rule, not enemy goods. For this reason, goods belonging to enemy subjects residing in neutral countries<sup>3</sup> do not, but goods belonging to subjects of neutral States residing in enemy country<sup>4</sup> do, bear enemy character; even when they are the goods of a foreign consul

domicile as 'such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country.' See also Farnsworth, *The Residence and Domicile of Corporations* (1939), pp. 47-52, 125-147. The essentials of this domicile may differ when it is sought to prove (a) a friendly or neutral domicile, or (b) a hostile domicile. (a) *To constitute a friendly or neutral commercial domicile*, residence in a friendly or neutral country is essential; mere non-residence in the enemy country will not suffice (*The Flamenco* (1915) 1 B. and C.P.C. 509; *The Annaberg* (1916) 2 B. and C.P.C. 241; *The Hypatia* [1917] P. 36; 2 B. and C.P.C. 377). But this commercial domicile cannot be established by a residence in a country wherein the claimant and his fellow-subjects enjoy the privileges of extra-territoriality, e.g. China) (*The Lützow* (1915) 1 B. and C.P.C. 528; *The Derfflinger* (No. 3) (1915) 1 B. and C.P.C. 643; *The Eumæus* (1915) 1 B. and C.P.C. 605; *Salti et Fils v. H.M. Procurator-General* [1919] A.C. 968, 3 B. and C.P.C. 374). See Hall, § 168 (n.). On the other hand, (b) *to constitute a hostile commercial domicile*, residence in the enemy country is not essential, and such a domicile may be acquired either (i) by residence (*The Harmony* (1800) 2 C. Rob. 322; *The Baltica* (1857) 11 Moore P.C. 141), or (ii) by having a house of trade or branch in the enemy country without personal residence there (*The Anglo-*

*Mexican* [1918] A.C. 422; 3 B. and C.P.C. 24), at any rate as regards those goods which the trader owns by virtue of, and in respect of, his trading in the enemy country (*The Lützow* [1918] A.C. 435; 3 B. and C.P.C. 37). A hostile commercial domicile can be effectively abandoned by prompt action upon the outbreak of war (*The Venus* (1814) 8 Cranch 253; *The Manningtry* [1916] P. 329; 1 B. and C.P.C. 497; *The Lützow*, [1918] A.C. 435; 3 B. and C.P.C. 37; and see *Nigel Gold Mining Co. v. Hoade* [1901] 2 K.B. 849).

On the whole matter of this note, see particularly a valuable article by Lewis in *B.Y.*, 1923-1924, pp. 60-77. See also Garner, *Prize Law*, Nos. 336-348; Baty, pp. 176-188.

<sup>1</sup> See, for example, the definition of 'enemy' as 'persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war' in the Trading with the Enemy (Amendment) Act, 1914 (5 Geo. V. c. 12), and the definition in the American Trading with the Enemy Act of 1917, cited by Garner, i. § 144.

<sup>2</sup> The British Prize Court does not recognise the claims of a pledgee, but has regard to the legal ownership of the goods. *The Odessa* [1915] P. 52; [1916] A.C. 145; (1914) 1 B. and C.P.C. 163, 554; and cp. *The Ningchow* (1915) 1 B. and C.P.C. 288; [1916] P. 221, where the pledgors had lost their right to redeem, and had thereby ceased to be owners.

<sup>3</sup> *The Postilion* (1779) Hay and Marriot, 245; *The Danous* (1802) 4 C. Rob. 255 (n.).

<sup>4</sup> *The Baltica* (1857) 11 Moore P.C. 141.

appointed and residing in enemy country.<sup>1</sup> Further, the goods of subjects of one belligerent domiciled on the territory of the other and allowed to remain there after the outbreak of war, acquire enemy character in the eyes of the former, but lose it (for the purposes of prize law) in the eyes of the latter.<sup>2</sup> Again, the produce of an estate on enemy territory belonging to an absent neutral subject bears enemy character, for 'nothing<sup>3</sup> can be more decided and fixed than the principle . . . that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned . . . whatever the local residence of the owner may be.' Further, the property of a house of trade established in an enemy country by a neutral subject resident elsewhere likewise bears enemy character, because the owner has a 'commercial domicile' in enemy country.<sup>4</sup> Lastly, and conversely, the enemy character of property of an enemy subject domiciled in enemy territory is unaffected by the fact that he has a house of trade in a neutral State.<sup>5</sup>

(2) *Nationality*.—On the other hand, according to the practice of France and many other European States, the nationality of the owner of the goods is exclusively the deciding factor, and it does not matter where he resides. Hence only such goods on enemy merchantmen bear enemy character as belong to subjects of the enemy, whether they were residing on enemy or on neutral territory; and all such goods on enemy merchantmen as belong to subjects of neutral States do not bear enemy character, whether those subjects reside on neutral or on enemy country.<sup>6</sup>

<sup>1</sup> *The Indian Chief* (1801) 3 C. Rob. 12.

<sup>2</sup> *The Venus* (1814) 8 Cranch 253.

<sup>3</sup> From the judgment of Sir William Scott in the case of *The Phoenix* (1803) 5 C. Rob. 41; see also *The Asturian* (1916) 2 B. and C.P.C. 202; [1916] P. 150; *Thirty Hogsheads of Sugar v. Boyle (Benzén v. Boyle)* (1815) 9 Cranch 191; Scott, *Cases*, 680.

<sup>4</sup> *The Anglo-Mexican and The Lützow* (1917) 3 B. and C.P.C. 24, 37; [1918] A.C. 422 and 435. See also the old cases of *The Portland*

(1800) 3 C. Rob. 41; *The Jonge Klassina* (1803) 5 C. Rob. 297; *The Freundschaft* (1819) 4 Wheaton 105.

<sup>5</sup> *The Clan Grant* (1915) 1 B. and C.P.C. 272.

<sup>6</sup> See the French cases of *Le Hardy contre La Voltigeante* (1802) and *La Paix* (1803) 1 Pistoye et Duverdy 321 and 486; *Le Joan* (1870); *Le Nicolaus* (1871); *Le Thalia* (1871); *Le Laura-Louise* (1871); Barbour 101, 108, 116, 119. During the World War, France for the most part followed her practice prevailing before the war. As to her practice

§ 91. The question of the transfer<sup>1</sup> of enemy vessels to subjects of neutral States, either shortly before or during war, forms part of the larger question of enemy character; for the point to be decided is whether such transfer<sup>2</sup> divests these vessels of their enemy character. It is obvious that, if it does, owners of enemy merchantmen can evade the danger of having their property seized and confiscated by selling their vessels to subjects of neutral States. Before the Naval Conference of London of 1908-1909, the maritime Powers had not agreed upon common rules concerning this subject. According to French<sup>3</sup> practice, no transfer of enemy vessels to neutrals after the outbreak of war could be recognised, and a vessel thus transferred retained enemy character; but any legitimate transfer anterior to the outbreak of war did give neutral character to a vessel. According to British and American practice,<sup>4</sup> on the other hand, enemy vessels could be transferred to a neutral flag, before or after the outbreak of war, and lose thereby their enemy character, provided that the transfer took place *bona fide*,<sup>5</sup> was not effected either in a blockaded port<sup>6</sup> or while the vessel was *in transitu*,<sup>7</sup> and that the vendor did not retain an interest in the vessel, or any right to recover or repurchase the vessel after the war.<sup>8</sup>

Clear and decisive rules concerning the transfer of enemy vessels, which distinguished between transfer to a neutral flag *before* and *after* the outbreak of hostilities, were laid down in the unratified Declaration of London.<sup>9</sup>

in 1939 see above, p. 219. See Verzijl, §§ 281-285. As to German practice during the World War see *The Kediri* (1919), *Entscheidungen*, ii. 275.

<sup>1</sup> This subject is fully discussed by Garner, i. §§ 121-138, and *Prize Law*, Nos. 302-326; Verzijl, §§ 217-233; Colombos, §§ 76-88; Genet, §§ 247-252; and in *Harvard Research* (1939), pp. 681-689.

<sup>2</sup> See Holland, *Prize Law*, § 19; Hall, § 171; Twiss, ii. §§ 162-163; Phillimore, iii. § 486; Boeck, Nos. 178-180; Fauchille, §§ 1385-1388 (4); Dupuis, Nos. 117-129, and *Guerre*, Nos. 62-66.

<sup>3</sup> See Dupuis, No. 97; Garner, i. §§ 126-127.

<sup>4</sup> Garner, i. §§ 127-128.

<sup>5</sup> *The Vigilantia* (1798) 1 C. Rob. 1; *The Baltica* (1857) 11 Moore P.C. 141; *The Benito Estenger* (1899) 176 U.S. 568.

<sup>6</sup> *The General Hamilton* (1805) 6 C. Rob. 61.

<sup>7</sup> The moment a vessel transferred *in transitu* reaches a port where the new owner takes possession of her, the voyage of the vessel is considered to have terminated: *The Vrow Margaretha* (1799) 1 C. Rob. 336; *The Jan Frederick* (1804) 5 C. Rob. 128.

<sup>8</sup> *The Sechs Geschwistern* (1801) 4 C. Rob. 100; *The Jemmy* (1801) 4 C. Rob. 31.

<sup>9</sup> Articles 55 and 56.

Transfer  
of Enemy  
Vessels.

(1) *Transfers before outbreak of war.*—According to Article 55, the transfer of an enemy vessel to a neutral flag, if effected *before* the outbreak of hostilities, was to be *valid*, unless the captor was able to prove that it was made in order to avoid capture. However, if the bill of sale was not on board, and the transfer was effected less than sixty days before the outbreak of hostilities, it was to be presumed to be void, unless the vessel could prove that it was not effected in order to avoid capture. To provide commerce with a guarantee that a transfer should not easily be treated as void on the ground that it was effected to evade capture, it was stipulated that, if the transfer was effected more than thirty days before the outbreak of hostilities, there was to be an absolute presumption of its validity, provided that it was unconditional, complete, and in conformity with the laws of the countries concerned, and that neither the control of, nor the profits arising from, the employment of the vessel remained in the same hands as before the transfer. But even in this case a vessel was to be suspect if the transfer took place less than sixty days before the outbreak of hostilities, and her bill of sale was not on board. Hence she might be seized and brought into a port for investigation by a prize court, and could not claim damages for the capture, even if the Court released her.

(2) *Transfers after outbreak of war.*—According to Article 56, the transfer of an enemy vessel to a neutral flag *after* the outbreak of hostilities was to be *void* unless the owner could prove that the transfer was not made in order to avoid capture. Moreover, there was to be an irrebuttable presumption that the transfer was void, if it had been made in a blockaded port, or while the vessel was *in transitu*, or if a right to repurchase or recover the vessel was reserved to the vendor, or if the requirements of the Municipal Law governing the right to fly the flag under which the vessel was sailing had not been fulfilled.

The Italian courts acted upon the articles of the unratified Declaration during the Turco-Italian War, and condemned the two sailing vessels *Vasilios* and *Aghios Gorghios*, originally Turkish, but sold *after* the outbreak of

war to a Greek subject, and registered under the Greek flag.<sup>1</sup>

Again, at the outbreak of the World War, Great Britain, France, and Russia determined to give effect to these articles,<sup>2</sup> and the important case of *The Dacia* was decided in accordance with them by the French Prize Court. The *Dacia* was purchased after the outbreak of war from a German company by an American citizen, while she was lying in an American port, and was admitted to American registry, the United States being then neutral. She was captured by a French cruiser on the way to Rotterdam, and condemned. The court held, treating Article 56 as binding upon it, that the claimant had failed to establish that the transfer was not made to avoid capture.<sup>3</sup> Later, however, France reverted to her traditional rule of the absolute invalidity of transfers into neutral ownership effected after the outbreak of war.<sup>4</sup>

The rules and practices so far considered in this section relate only to the transfer of *private* enemy vessels; they do not apply to the transfer by a belligerent State to a neutral of one of his men-of-war with a view to escape capture. The question whether a war-vessel could thus divest itself

<sup>1</sup> See Garner, i. § 129 (n.).

<sup>2</sup> For a British case where an attempt had been made to transfer a German vessel to the British flag while *in transitu* just before the outbreak of war between Great Britain and Germany see *The Tommi* (1914) 1 B. and C.P.C. 16; [1914] P. 251. See also the Canadian case of *The Bellas* (1914) 1 B. and C.P.C. 95, and the French case of *The Colonia* in R.G., xxii. (1915), *Jurisprudence*, pp. 45-47, and Garner, i. § 123, and Verzijl, § 221, especially the cases of *Eugenia ou Lombarda* in Fauchille, *Jur. ital.*, p. 471, and *Atlanta ou Stella Polare*, *ibid.*, § 435. See also the case of *Souhl ex-Corcovado* (the transfer of a German vessel to an Ottoman subject after the armistice between Turkey and France) in R.G., xxvii. (1920), *Jurisprudence*, p. 60, and Verzijl, § 222.

<sup>3</sup> See R.G., xxii. (1915), *Jurisprudence*, p. 83; *A.J.*, ix. (1915) p. 1015,

and Hendrick, *Life and Letters of W. H. Page*, i. p. 392, and Garner, i. §§ 125, 131-133. Compare *The Edna* [1921] 1 A.C. 735; 3 B. and C.P.C. 926. See also Garner, i. §§ 124-125, 132-133, 136, 138, who discusses the points raised, and mentions the cases of *The Brindilla*, *Platuria*, and *Petrolite*, the German case of *The Pass of Balmaha*, and abortive negotiations between Chile and Great Britain for the recognition of the validity of the transfer to the Chilean flag of German vessels which the Chilean Government desired to purchase. Later in the war, when the shortage of shipping became acute, Great Britain raised no objection to the transfer of an enemy vessel to the American flag. See Garner, i. § 136 (n.).

<sup>4</sup> See the *Victoire ex-Virginia* in R.G., xxviii. (1921), *Jurisprudence*, p. 15.



of enemy character arose during the World War, when two German cruisers, *Goeben* and *Breslau*, unable to escape from the Mediterranean, ran up the Dardanelles to Constantinople, and were there reported to have been sold to Turkey, then neutral.<sup>1</sup> Vessels so transferred by a belligerent to a neutral *subject* had come before the British<sup>2</sup> and American<sup>3</sup> Prize Courts in older wars and had been condemned, on the ground that a belligerent war-vessel cannot put off its enemy character during a war.

Transfer  
of Goods  
at Sea.

§ 92. The transfer of enemy goods on enemy vessels likewise forms part of the larger subject of enemy character, for the question here also is whether such a transfer divests these goods of their enemy character,<sup>4</sup> and there was likewise no unanimous practice among the maritime States when the Naval Conference met in London in 1908-1909.<sup>5</sup> British and American practice has always refused to recognise a sale *after the outbreak of war* of goods *in transitu* if the vessel was captured before the neutral buyer had actually taken possession of the goods.<sup>6</sup> On the other hand, it seems that French practice used to recognise such a sale *in transitu*, provided it could be proved to have been *bona fide*.<sup>7</sup>

The following is believed to be a correct summary of the

<sup>1</sup> See below, § 349 (n.).

<sup>2</sup> *The Minerva* (1807) 6 C. Rob. 396.

<sup>3</sup> See *The Georgia* (1868) 7 Wall. 32, and Garner, i. § 139, who also cites the American case of *The Etta* (1864) 25 Fed. Cases No. 15, p. 60.

<sup>4</sup> See Hall, § 172; Twiss, ii. §§ 162, 163; Phillimore, iii. §§ 487, 488; Dupuis, Nos. 141-149, and *Guerre*, Nos. 68-73; Boeck, Nos. 182, 183; Verzijl, §§ 247-280.

<sup>5</sup> The unratified Declaration of London provided by Article 60 that enemy goods on board an enemy vessel retained their enemy character until they reached their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods were *in transitu*. Such goods might therefore be confiscated, although they had been sold *in transitu* to subjects of neutral States. A special rule was provided for the case of an enemy consignee of goods

on board an enemy vessel becoming bankrupt while the goods were *in transitu*. In a number of countries—Great Britain is one of them, see § 44 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71)—an unpaid vendor has, in the event of the bankruptcy of the buyer, a recognised legal right to recover such goods as have already become the property of the buyer, but have not yet reached him (right of stoppage *in transitu*). For this reason, Article 60 stipulated that if, prior to the capture, the neutral consignor exercised, on the bankruptcy of the enemy consignee, his right of stoppage *in transitu*, the goods regained their neutral character, and might not be confiscated. See Verzijl, § 280; *The Felician* (1915) L. R. iii. 418.

<sup>6</sup> *The Jan Frederick* (1804) 5 C. Rob. 128; *The Ann Green* (1812) 1 Gallison 274.

<sup>7</sup> See Boeck, No. 162; Dupuis, No. 142; Fauchille, § 1389 (1).

principal rules applicable by British Prize Courts in deciding whether or not to condemn captured goods which have been sold while *in transitu* on board British or allied or enemy vessels.<sup>1</sup> (i) If the sale takes place *bona fide* before, and without anticipation of, a war in which Great Britain is a belligerent, then Municipal Law is applied to determine the question when the property in the goods passed, a question the solution of which will decide the further question whether the ownership, and therefore the character, of the goods at the time of capture is enemy or not.<sup>2</sup> (ii) If, on the other hand, the goods are sold either before and in anticipation of such a war, or after the outbreak of such a war, then Prize Law is applied to the question when the property passed; and Prize Law answers that question by saying that (a) goods consigned by an enemy subject to a neutral subject do not usually<sup>3</sup> become neutral property until actual delivery,<sup>4</sup> for 'captors' rights cannot be defeated by a mere transfer of legal ownership by documents without actual delivery'<sup>5</sup>; and that (b) goods consigned by a neutral subject to an enemy subject are liable to condemnation, although by Municipal Law the property may still remain in the neutral consignor.<sup>6</sup>

<sup>1</sup> It will be noticed that some of the cases to be cited relate to neutral vessels; the question may become relevant in their case—for instance, in applying the 'doctrine of infection' (*The Kronprinzessin Margaretha* [1921] 1 A.C. 486; 3 B. and C.P.C. 803), or under the 'Reprisals Orders' (*The United States* [1917] P. 30; 2 B. and C.P.C. 390); but in the main it does not apply to goods on board neutral vessels, since, unless contraband, they are exempt from capture.

<sup>2</sup> *The Vrow Margaretha* (1799) 1 C. Rob. 336; *The Miramichi* [1915] P. 71; 1 B. and C.P.C. 137; *The Parchim* [1918] A.C. 157; 2 B. and C.P.C. 489; *The Daksa* [1917] A.C. 386; 2 B. and C.P.C. 358; *The Southfield* [1917] A.C. 390 (n.); 1 B. and C.P.C. 332; *The Prinz Adalbert* [1917] A.C. 586; 3 B. and C.P.C. 1; *The Orteric* [1920] A.C. 724. The German Prize Courts apply in the

first instance the Municipal Law of the persons involved in the transaction—see *The Ella, Entscheidungen*, ii. 60, and *The Victoria, ibid.*, 281; Verzijl, § 262.

<sup>3</sup> *The Dirigo* [1919] P. 204; 3 B. and C.P.C. 439.

<sup>4</sup> *The Baltica* (1857) 11 Moo. P.C. 141; *The United States* [1917] P. 30; 2 B. and C.P.C. 390; *The Kronprinzessin Margaretha and Other Ships* [1921] 1 A.C. 486; 3 B. and C.P.C. 803.

<sup>5</sup> *The United States* [1917] P. at p. 34; 2 B. and C.P.C. at p. 393.

<sup>6</sup> *The Sally* (1795) 3 C. Rob. 300 (n.); and see *The Palm Branch* [1919] A.C. 272; 3 B. and C.P.C. 241 (where neutral property vested in enemy underwriters after capture, but before trial). On the whole subject of this paragraph see Verzijl, §§ 247-280; Garner, *Prize Law*, Nos. 349-376; and Colombos, §§ 70-75.

# CHAPTER II

## THE OUTBREAK OF WAR

### I

#### COMMENCEMENT OF WAR

Grotius, iii. c. 3, §§ 5-14—Bynkershoek, *Quaestiones Juris publici*, i. c. 2—Vattel, iii. §§ 51-65—Hall, § 123—Westlake, ii. pp. 19-28—Phillimore, iii. §§ 51-66—Twiss, ii. §§ 31-40—Halleck, i. pp. 574-580—Taylor, §§ 455-456—Moore, vii. §§ 1106-1108—Walker, § 37—Hershey, Nos. 338-342—Wharton, iii. §§ 333-335—Wheaton, § 297—Bluntschli, §§ 521-528—Heffter, § 120—Lueder in *Holtzendorff*, iv. pp. 332-347—Gareis, § 80—Liszt, § 57, A, i—Fauchille, §§ 1027-1038—Despagnet, Nos. 513-516—Mérignhac, iii<sup>a</sup>. pp. 64-84—Pradier-Fodéré, vi. Nos. 2671-2693—Nys, iii. pp. 29-49—Rivier, ii. pp. 220-228—Calvo, iv. §§ 1899-1911—Fiore, iii. Nos. 1272-1276, and *Code*, Nos. 1427-1433—Martens, ii. § 109—Pillet, pp. 61-72—Lawrence, *War*, pp. 26-44—Barclay, *Problems*, pp. 53-58—Higgins, pp. 202-205—Holland, *War*, § 16, and *Lectures*, pp. 251-262—Keith's *Wheaton*, pp. 635-640—Lémonon, pp. 395-406—Nippold, ii. pp. 6-10—Cruchaga, §§ 776-786—Suarez, §§ 348-351—De Louter, ii. pp. 234-244—Rolin, §§ 185-208—Mérignhac-Lémonon, i. 55-112—Gemma, pp. 277-291—Hyde, ii. §§ 602-604—Spaight, *Land*, pp. 20-33—Spaight, *Air*, pp. 49-58—Scott, *Conferences*, pp. 516-522—Ariga, § 11-12—Takahashi, pp. 1-25—Kunz, pp. 38-40—*Land Warfare*, §§ 8-10—Sainte-Croix, *La déclaration de guerre et ses effets immédiats* (1892)—Bruyas, *De la déclaration de guerre, etc.* (1899)—Tambaro, *L'inizio della guerra et la 3<sup>a</sup> convenzione dell' Aja del 1907* (1911)—Maurel, *De la déclaration de guerre* (1907)—Soughimoura, *De la déclaration de guerre* (1912)—Steinlein, *Die Form der Kriegserklärung* (1917)—Brocher in *R.I.*, iv. (1872) p. 400—Féraud-Giraud in *R.I.*, xvii. (1885) p. 19—Nagaoka in *R.I.*, 2nd ser., vi. p. 475—Rolin in *Annuaire*, xx. (1904) pp. 64-70—Ehren and Martens in *R.G.*, xi. (1904) pp. 133, 148—Dupuis in *R.G.*, xiii. (1906) pp. 725-735—Stowell in *A.J.*, ii. (1908) pp. 50-62—Cavaglieri in *Rivista*, 2nd ser., viii. (1916) pp. 81-90—Hudson in *Harvard Law Review*, xxxix. (1926) pp. 1020-1028—Baty in *A.J.*, xxx. (1936) pp. 381-398—Wilson in *A.S. Proceedings*, 1938, pp. 106-119—Eagleton in *A.J.*, xxxii. (1938) pp. 19-35.

Com-  
mence-  
ment of  
War in  
general.

§ 93. According to the former practice, a condition of war could arise, either through a declaration of war, or through a proclamation and manifesto by a State that it considered itself at war with another State, or through one State committing hostile acts of force against another State. History presents many instances of wars commenced in

one of these three ways. Although Grotius laid down the rule that a declaration of war is necessary for its commencement,<sup>1</sup> the practice of the States shows that this rule was not accepted, and many wars have taken place between the time of Grotius and our own without a previous<sup>2</sup> declaration of war. No doubt many writers,<sup>3</sup> following the example of Grotius, have asserted the existence of a rule that a declaration is necessary for the commencement of war; but, until the Second Peace Conference of 1907, such a rule was sanctioned neither by custom nor by a general treaty of the Powers. Moreover, many writers<sup>4</sup> distinctly approved of the practice of the Powers.

It was not asserted that a State was justified in opening hostilities without any preceding conflict. There can be no greater violation of the Law of Nations than for a State to begin hostilities or to declare war in time of peace without previous controversy, and without having endeavoured to settle the conflict by negotiation.<sup>5</sup> But if negotiation had been tried without success, a State did not act treacherously by resorting to hostilities without a declaration of war, especially after diplomatic intercourse had been broken off.<sup>6</sup> The rule, adopted by the First and Second Hague Con-

<sup>1</sup> iii. c. 3, § 5.

<sup>2</sup> See Maurice, *Hostilities without Declaration of War* (1883).

<sup>3</sup> See, for instance, Vattel, iii. § 51; Calvo, iv. § 1907; Bluntschli, § 521; Fiore, iii. Nos. 1274-1275; Heffter, § 120.

<sup>4</sup> See, for instance, Bynkershoek, *Quaestiones Juris publici*, i. c. 2; Kübler, § 238; G. F. Martens, § 267; Twiss, ii. § 35; Phillimore, iii. §§ 51-55; Hall, § 123.

<sup>5</sup> See above, § 3, where the rule is quoted that no State is allowed to make use of compulsive means of settling differences before negotiation has been tried.

<sup>6</sup> The question of constitutional limitations upon the Government of a State in regard to the right to declare war is a question of Municipal Law and need not therefore be discussed here in detail. In a number of States the constitution provides for the necessity of parliamentary

approval of a declaration of war. These States include France, Argentina, Holland, Brazil, Yugoslavia, and many others. In other States, such as the United States, the right to declare war is reserved to the legislature. See Mirkine-Guetzévitch, *Droit constitutionnel international* (1933), pp. 205-244; Morelli in *Rivista*, xxv. (1933) pp. 3-23; Pella in *R.G.*, xl. (1933) pp. 415-424, for a survey of the law of the various countries. See above, § 52*p*, p. 160. Article 1 of the French Law of July 11, 1938, on the general organisation of the nation for time of war provides that in the event of war a notification must be sent to the League; for the communication of September 5, 1939, announcing the war with Germany, see *League of Nations Monthly Summary*, 1939, p. 317. On the position in the United States see Putney in *National University Law Review*, 1927, reprinted as Senate Doc., 70th Congress, 1st Session, No. 39.

ferences,<sup>1</sup> that, *as far as circumstances allow*, before appeal to arms recourse must be had to the good offices or mediation of friendly Powers, did not essentially alter matters, for the formula *as far as circumstances allow*, in practice, leaves everything to the discretion of the Power bent on making war.

The outbreak of war between Russia and Japan in 1904, through Japanese torpedo-boats attacking Russian men-of-war at Port Arthur before a formal declaration of war, caused a movement for the establishment of some written rules concerning the commencement of war.<sup>2</sup> The Second Hague Conference in 1907 took up the matter and produced Convention III. relative to the commencement of hostilities. That Convention is, as is shown below, of a distinctly limited scope. The failure to observe it does not render the war illegal; neither does it take away from the hostilities thus commenced the character of war. Subsequent to the acceptance, in the Covenant of the League and the Pact of Paris, of substantial limitations of the right to resort to war, the value of the Convention has suffered a further diminution inasmuch as a number of States, intent upon avoiding the formal appearance of a breach of these obligations, have adopted the practice of commencing hostilities, indistinguishable from warlike operations, without actually declaring war. Thus the wars of Italy with Abyssinia in 1935,<sup>3</sup> of Japan with China in 1937, of Germany with Poland in 1939, and of Russia with Finland in the same year, opened without a formal declaration of war.<sup>4</sup>

Declara-  
tion of  
War.

§ 94. By Article 1 of Convention III., 'The contracting Powers recognise that hostilities between them must not

<sup>1</sup> Article 2 of Convention I.

<sup>2</sup> The Institute of International Law, at its meeting at Ghent in 1906, adopted three principles, according to which war should not be commenced without either a declaration of war or an ultimatum, and, in either case, delay sufficient to provide against treacherous surprise should be allowed before the belligerent had recourse to actual hostilities. See *Annuaire*, xxi. (1906) p. 283.

<sup>3</sup> See above, p. 140. And see Wilson in *A.J.*, xxx. (1936) pp. 80-83.

In August 1935, Abyssinia adhered to Hague Convention No. III.

<sup>4</sup> In some of these wars third States refrained, for various reasons, from treating the contest as war. Thus Great Britain did not regard the Sino-Japanese hostilities in 1937 as constituting war (see below, p. 241, n. 2). This was also the attitude of the United States with regard both to the Sino-Japanese and the Russo-Finnish hostilities. But see above, § 52b. In cases, like those mentioned of an actual contest of wide dimensions between the armed forces of two

commence without a previous and unequivocal warning, which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war.'<sup>1</sup>

A declaration of war is a communication by one State to another that the condition of peace between them has come to an end, and a condition of war has taken its place. In former times, declarations of war used to take place with greater or lesser solemnities<sup>2</sup>; but during the last few centuries all these formalities have vanished, and nowadays it may take place through a simple communication.<sup>3</sup> The only two conditions with which, according to Article 1, declarations of war must comply, are, that they must be unmistakable, and that they must state the reason for resort to arms. No delay between the declaration and the actual commencement of hostilities is stipulated, and it is, therefore, possible for a Power to open hostilities immediately after the communication of the declaration of war to the enemy.<sup>4</sup>

States the attitude of third countries is probably not of decisive importance for the legal qualification of the contest which, as between the belligerents, must be regarded as war for the purposes of International Law. But it is not clear to what extent an undeclared war of this nature imposes upon third States the obligations of neutrality. They may, if they wish so, announce their neutrality and thus bring into operation the resulting rights and obligations. However, it is arguable that, in the absence of such assumption of neutral status, they retain freedom of action so long as either belligerent does not deprive them of it by formally declaring war upon his adversary.

<sup>1</sup> Higgins, p. 198. As to the actual moment of the commencement of war see Deak in *A.J.*, xx. (1926) pp. 502-515.

<sup>2</sup> See Coleman Phillipson, *International Law and Custom of Ancient Greece and Rome*, ii. 197-199, cited by Hyde, ii. § 602 (n.).

<sup>3</sup> Thus, on July 28, 1914, Austria-Hungary addressed a formal declaration of war to Serbia (*Collected Diplomatic Documents* (1915), p. 44).

On August 2, 1914, the German ambassador at St. Petersburg handed a declaration of war to the Russian Foreign Minister (*ibid.*, p. 234). On August 3, 1914, the German ambassador at Paris handed to the French Minister for Foreign Affairs a letter alleging hostile acts by French forces, and stating that 'in the presence of these acts of aggression the German Empire considers itself in a state of war with France' (*ibid.*, p. 240). On April 6, 1917, the Congress of the United States passed a joint resolution declaring that whereas Germany had 'committed repeated acts of war' against the United States, the state of war which had thus been thrust upon the United States was 'thereby formally declared' (*A.J.*, xi. (1917), Suppl., p. 151); and see Hudson in *Harvard Law Review*, xxxix. (1926) pp. 1020-1028. For a list of declarations of war during the World War see Garner, i. § 26. See also Opet in *Strupp, Wört.*, iii. pp. 443-450.

<sup>4</sup> The form of words used in a declaration of war is immaterial so long as there is no doubt as to the intention to declare war. Although

The importance of the declaration of war, and the fact that according to Article 1 of Convention III. it must be unmistakable and must state the reason for resort to arms, would seem to require a written document, which is to be handed over to the other party by an envoy. Further, the fact that Article 2 of Convention III. expressly enacts that the notification of the outbreak of war to neutrals may even be made by telegraph points the same way, for the conclusion is justified that the declaration of war stipulated as necessary by Article 1 may *not* be made by telegraph. And if a telegraph message is inadmissible, much more so are telephone messages, and communications by word of mouth.<sup>1</sup>

War, as between the belligerents, is considered to have commenced from the date of its declaration, although actual hostilities may not have been commenced until much later. On the other hand, as between the belligerents and neutrals, a war is not considered to have commenced until its outbreak has been notified to the neutrals, or has otherwise become unmistakably known to them. For this reason, Article 2 of Convention III. enacts that the belligerents must at once after the outbreak of war notify <sup>2</sup> the neutrals, even if only by telegraph, and that the state of war shall not take effect with regard to neutrals until after they have

the communication addressed by the French Government to Germany on September 3, 1939, did not in terms contain a declaration of war—the form of words used referred to the discharge of the French obligations to Poland—in its communications to the League of Nations and neutral States it announced that a state of war existed between France and Germany: *League of Nations, Monthly Summary*, 1939, p. 317; the *French Yellow Book (1938-1939)* (English translation), pp. 351, 352.

<sup>1</sup> The severance of diplomatic relations has sometimes taken the place of a declaration of war. Thus, in the course of the World War there were forty-seven cases of declaration of war and thirteen cases of mere severance of diplomatic relations, e.g. between France and Austria-Hungary, and

between Germany and Serbia—see *R.G.*, xxv. (1923) p. 85; and Liszt, § 57, A, i.

If States A and B are in alliance and A is at war with State C, is B at war with C? For instance, when Italy declared war upon Austria-Hungary in 1915, did a state of war arise between Italy and Germany? The German Imperial Court answered this question in the affirmative—see Valéry in 43 *Clunet* (1916), pp. 405-415, and Garner, i. § 25 (n. 1). See Hatschek, pp. 292-293, who takes the same view, and considers a declaration of war unnecessary; and see Cavaglieri in *Rivista*, 2nd ser., viii. (1919) pp. 81-90. Presumably the rule is the same for all co-belligerents, whether allies or merely associates. See Strupp in *Strupp, Wört.*, i. 720, who disagrees with Hatschek.

<sup>2</sup> See below, § 307.

received notification, unless it be established beyond doubt that they were in fact aware of a state of war.

§ 95. The second form which the unequivocal warning, Ulti-  
provided for by Article 1 of Convention III., may take, is <sup>matum</sup>.  
an 'ultimatum with a conditional declaration of war.'

Ultimatum<sup>1</sup> is the technical term for a written communication by one State to another which ends amicable negotiations respecting a difference, and formulates, for the last time and categorically, the demands to be fulfilled if other measures are to be averted. An ultimatum may be simple or qualified. It is *simple*, if it does not include an indication of the measures contemplated by the Power sending it. It is *qualified*, if it does indicate the measures contemplated, whether they be retorsion, or reprisals, pacific blockade, occupation of a certain territory, or war.<sup>2</sup> Now, Article 1 of Convention III. provides for a qualified ultimatum, for it must be so worded that the recipient can have no doubt about the commencement of war in case he does not comply with its demands. For this reason, if a State has sent a simple ultimatum to another, or a qualified ultimatum threatening a measure other than war, it is not, in case of non-compliance, justified in commencing hostilities at once without a previous declaration of war. So Italy

<sup>1</sup> See above, § 28.

<sup>2</sup> Thus, on August 4, 1914, the British ambassador at Berlin handed to the German Foreign Minister a written statement that, unless Germany could give an assurance by midnight that she would proceed no further with the violation of the Belgian frontier, the British Government felt bound 'to take all steps in their power to uphold the neutrality of Belgium' (*Collected Diplomatic Documents* (1915), pp. 109-112). The war which broke out with Germany in September 1939 was preceded by what may be called a double British ultimatum. On September 1 a communication was sent to the German Government informing it that unless it was prepared to suspend all aggressive action against Poland and to withdraw its forces from Polish territory, Great Britain would fulfil

her obligations to Poland. On September 3 at 9 a.m. the British ambassador informed the German Government that unless an assurance to that effect reached the British Government by 11 a.m. a state of war would exist between the two countries as from that hour. No reply was received, and the German representative in London was informed at that hour that a state of war existed between Great Britain and Germany. See Sir N. Henderson's Final Report of September 20, 1939: Cmd. 6115, p. 25. The French ultimatum presented at noon expired at 5 p.m. on September 3. See Asbeck, *Das Ultimatum im modernen Völkerrecht* (1933), pp. 66-88, for a collection of *ultimata* in the last hundred years. See also Braun in *Strupp, Wört.*, iii. pp. 1100-1106 and Frei, *Die völkerrechtliche Wertung des Ultimatums* (1938).



sent a declaration of war to Turkey in 1911, although an ultimatum threatening the occupation of Tripoli had preceded it.

Convention III. does not enact a minimum length of time which an ultimatum must grant before the commencement of hostilities; this period may, therefore, be only very short, as, for instance, a number of hours. Once more, however, it is necessary to emphasise that it is a violation of International Law to send an ultimatum without previously having tried to settle a difference by negotiation, or by any other method of pacific settlement to which a State has pledged itself by membership of the League of Nations or by some other treaty obligation. And, as has already been pointed out,<sup>1</sup> the mere threat, contained in the ultimatum, to resort to war is probably in itself a breach of the undertaking in which a State has renounced the right to resort to war as an instrument of national policy.

The state of war following an ultimatum must likewise be notified to neutrals, for Article 2 of Convention III. applies to this case also. Further, for the same reason as in the case of a declaration of war, an ultimatum containing a conditional declaration of war must be communicated to the other party by a written document.

Acts  
which  
begin a  
War.

§ 96. There is no doubt that, in consequence of Convention III., recourse to hostilities without a previous declaration of war, or a qualified ultimatum, is forbidden. But a war can nevertheless break out without these preliminaries.<sup>2</sup> A State might deliberately order hostilities to be commenced without a previous declaration of war, or a qualified ultimatum. Further, the armed forces of two States having a grievance against one another might engage in hostilities without having been authorised thereto, and without the respective Governments ordering them to desist from further hostilities. Again, acts of force by way of

<sup>1</sup> See above, p. 152, n. 6.

<sup>2</sup> Turkey entered the World War by bombarding a Russian port. Turkey had not, however, ratified

Convention III. In 1939 Germany commenced the war against Poland by crossing the frontier and bombarding military objectives from the air.

reprisals, or during a pacific blockade, or an intervention, might be forcibly resisted by the other party, hostilities breaking out in this way.

It is certain that States which deliberately order the commencement of hostilities without a previous declaration of war or a qualified ultimatum commit an international delinquency; but they are nevertheless engaged in war. Further, it is certain that States which allow themselves to be dragged into a condition of war through unauthorised hostile acts of their armed forces commit an international delinquency; but they are nevertheless engaged in war. Again, war is actually in existence if the other party forcibly resists<sup>1</sup> acts of force undertaken by a State by way of reprisals, or during a pacific blockade, or an intervention. Now, in all these and similar cases, all the laws of warfare must find application, for a war is still war in the eyes of International Law, even though it has been illegally commenced, or has automatically arisen from acts of force which were not intended to be acts of war.

However that may be, Article 2 of Convention III. also applies to wars which have so broken out, and the belligerents must without delay send a notification to neutral Powers, so that these may be compelled to fulfil the duties of neutrality. But, of course, neutral Powers must in this case likewise, even without notification, fulfil the duties of neutrality, if they are unmistakably aware of the outbreak of war.<sup>2</sup>

<sup>1</sup> At any rate if the resistance is made *animo belligerendi*; see next note and Strupp in *Strupp, Wört.*, i. p. 720.

<sup>2</sup> With regard to the moment of the outbreak of war the following definition has been suggested: 'A state of war arises in International Law (a) at the moment, if any, specified in a declaration of war; or (b) if none is specified, then immediately upon the communication of a declaration of war; or (c) upon the commission of an act of force, under the authority of a State, which is done *animo belligerendi*, or which, being done *sine animo belligerendi*, but by way of reprisals, or intervention, the

other State elects to regard as creating a state of war, either by repelling force by force or in some other way; retroactive effect being given to this election, so that the state of war arises on the commission of the first act of force': see McNair in *Grotius Society*, xi. (1926) p. 45. See also Rumpf in *Boston University Law Review*, xviii. (1938) pp. 686-714. On the definition of war in the English and American courts see Ronan in *A.J.*, xxxi. (1937) pp. 642-658. The question whether Great Britain is at war with another country is one governed by the principle of conclusiveness of the statements of the Crown in foreign affairs: see vol. i.

## II

## EFFECTS OF THE OUTBREAK OF WAR

- Vattel, iii. § 63—Hall, §§ 124-126—Westlake, ii. pp. 32-55—Lawrence, §§ 143-145—Manning, pp. 163-165—Phillimore, iii. §§ 67-91—Twiss, ii. §§ 41-61—Halleck, i. pp. 580-607, and ii. pp. 124-140—Taylor, §§ 461-468—Walker, §§ 44-50—Holland, *Lectures*, pp. 263-285—Keith's Wheaton, pp. 640-672, 700-706—Hershey, Nos. 343-350—Wharton, iii. §§ 336-337<sup>a</sup>—Wheaton, §§ 298-319—Moore, v. § 779, and vii. §§ 1135-1142—Heffter, §§ 121-123—Lueder in *Holtendorff*, iv. pp. 347-362—Gareis, § 81—Liszt, § 57, A, ii, iii—Ullmann, § 173—Fauchille, Nos. 1044-1065—Despagnet, Nos. 517-519—Pradier-Fodéré, vi. Nos. 2694-2720—Mérignhac, iii<sup>a</sup>. pp. 84-115—Nys, iii. pp. 50-70—Rivier, ii. pp. 228-237—Calvo, iv. §§ 1911-1931—Fiore, iii. Nos. 1290-1301, and *Code*, Nos. 1444-1450—Martens, ii. § 109—Longuet, §§ 8-15—Pillet, pp. 72-84—Bordwell, pp. 200-211—Spaight, *Land*, pp. 25-33—Ariga, §§ 13-15—Takahashi, pp. 26-88—Lawrence, *War*, pp. 45-55—Garner, i. §§ 27-37, 39-117, 141-143, 162-171, 173-174—Hatschek, pp. 143-160—Cruchaga, §§ 789-797—Suarez, §§ 352-357—Rolin, §§ 233-270—Mérignhac-Lémonon, i. pp. 112-125—Strupp, *Grundzüge*, pp. 176-183—Hyde, ii. §§ 547-551, 605-623—Balladore Pallieri, pp. 361-376—Kunz, pp. 41-54—Verzijl, §§ 344-382 and 564-576—Fenwick, pp. 440-456—Sainte-Croix, *La déclaration de guerre et ses effets immédiats* (1892), pp. 166-207—Meyer, *De l'interdiction du commerce entre les belligérants* (1902)—Jacomet, *La guerre et les traités* (1909)—Markovitch, *Des effets de la guerre sur les contrats entre particuliers* (1912)—Wehberg, pp. 194-200—Borchard, §§ 46, 354—Huberich, *Law relating to Trading with the Enemy* (1918)—Campbell, *The Law of War and Contract* (1918)—Trotter, *The Law of Contract during and after War* (1914-1915)—Picciotto and Wort, *The Treaty of Peace with Germany (Clauses affecting Mercantile Law)* (1919)—Isay, *Die privaten Rechte und Interessen im Friedensvertrag* (1919), pp. 202-272—McNair, *Legal Effects of War* (1920)—Scobell-Armstrong, *War and Treaty Legislation* (1922)—Spiropoulos, *Ausweisung und Internierung feindlicher Staatsangehöriger* (1922)—Ricca-Barberis, *Sul Diritto della Guerra e del Dopoguerra* (1926)—Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929), pp. 188-208—Politis in *Annuaire*, xxiii. (1910) pp. 251-281, and xxiv. (1911) pp. 200-223—Beer and Kleinfeller in *Z.I.*, xxv. (1915) pp. 321-338, and pp. 383-395—Audinet in *R.G.*, xxvii. (1920) pp. 289-357—Hurst in *B.Y.*, 1921-1922, pp. 37-47—Beckett in *Law Quarterly Review*, xxix. (1923) pp. 89-97—Keeley in *Grotius Society*,

§ 401 (n.). The same applies to the question whether war exists between two foreign States. See, however, for a slight qualification of this principle both by the Court and by the Foreign Office, *Kawasaki Kisen Kaisha v. Baniham S.S. Co., Ltd.* [1939] 2 K.B. 544; (1938) 3 All E.R. 80, in which the Court found, for the purpose of interpreting the term 'war' in a charterparty, that there was war between China

and Japan in September 1937 although the Foreign Office stated that His Majesty's Government 'are not at present prepared to say that in their view a state of war exists.' See, on the other hand, *Spanish Government v. North of England Steamship Co.* (1938) 54 T.L.R. 852 for a strict interpretation of the term 'blockade' in a commercial document. See Elkin in *Clunet*, 66 (1939), pp. 165-168, for comment on both cases.

xii. (1927) pp. 7-17—McNair in *Hague Recueil*, 22 (1928) (ii.), pp. 496-510, and *ibid.*, 59 (1937) (i.), pp. 527-581, and in *Law Quarterly Review*, 56 (1940) pp. 173-207.

§ 97. When war breaks out, even if it be limited to two members of the Family of Nations, nevertheless the whole Family of Nations is affected, since the rights and duties of neutrality devolve upon such States as are not parties to the war. And the subjects of neutral States may feel the consequences of the outbreak of war in many ways. War is not only a calamity to the commerce and industry of the whole world, but also involves the alteration of the legal position of neutral merchantmen on the open sea, and of subjects of neutral States within the boundaries of the belligerents. For the belligerents have the right to visit, search, and, if need be, capture neutral merchantmen on the open sea; and foreigners who remain within the boundaries of the belligerents, although subjects of neutral Powers, acquire in a degree and to a certain extent enemy character.<sup>1</sup> However, the outbreak of war tells chiefly and directly upon the relations between the belligerents and between their respective subjects. Yet it would not be correct to maintain that all legal relations between the parties thereto, and between their subjects, disappear with the outbreak of war. War is not a condition of anarchy, indifferent or hostile to law, but a condition recognised and ruled by International Law, although it involves a rupture of peaceful relations between the belligerents.

§ 98. The outbreak of war at once causes the rupture of diplomatic intercourse between the belligerents, if this has not already taken place. The respective diplomatic envoys are recalled and ask for their passports, or receive them without any previous request; but they enjoy their privileges of inviolability and extraterritoriality for the period of time requisite for leaving the country.<sup>2</sup>

<sup>1</sup> See above, § 88. As to the relations between neutral subjects and the belligerent in whose territory they are resident see Hyde, ii. §§ 625-632.

<sup>2</sup> For the incidents attending the departure of the envoys of the

various belligerents at the outbreak of the World War see Garner, i. §§ 27-33. As to the departure of the British and French ambassadors from Berlin on September 4, 1939, see Sir N. Henderson's Final Report of September 20, 1939: Cmd. 6115.

The official residence<sup>1</sup> of a departed envoy is, according to a usage,<sup>2</sup> confided to the protection of another foreign envoy, and the archives, if left behind, are placed under seals.<sup>3</sup> Sometimes a member of the retinue of the departing envoy is left in charge, with the permission of the local Government.

With war, consular activity likewise comes to an end, and the consular archives are left in charge of an *employé* of the consulate, or of the consul of another State.<sup>4</sup> But the question whether the consuls themselves must be permitted to leave aroused recrimination at the beginning of the World War. Several belligerent States prevented enemy consuls from departing,<sup>5</sup> and accused one another of allowing them to suffer great indignities.<sup>6</sup>

Effect on  
Treaties.

§ 99. The doctrine was formerly held, and is even nowadays held by a few writers,<sup>7</sup> that the outbreak of war *ipso facto* cancels all treaties previously concluded between the belligerents, excepting only those concluded especially for war. But the vast majority of modern writers on International Law have abandoned this standpoint, and the opinion is pretty general that war by no means annuls every treaty. But unanimity as to what treaties are or are not

<sup>1</sup> None the less, it is stated in a German official White Paper (see Garner, i. § 32) that the German Embassy at St. Petersburg was wrecked by a mob in August 1914. As to the confiscation of the seat of the Austrian Legation to the Holy See in Rome see above, vol. i. § 390 (n.).

<sup>2</sup> See details in Garner, i. § 39 (n.).

<sup>3</sup> For the arrangements made at the outbreak of the World War see Garner, i. § 39.

<sup>4</sup> See above, vol. i. § 436. And see Bouffanais, *Les consuls en temps de guerres et de troubles* (1933), pp. 13-58; Rousseau in *R.G.*, xl. (1933) pp. 508-514; Dollot, *ibid.*, xlv. (1939) pp. 105-117. And see, generally, on the protection of alien enemies by a neutral Power, Bouffanais, *op. cit.*, pp. 39 *et seq.*, and Escher, *Der Schutz der Staatsangehörigen im Ausland durch fremde Gesandtschaften und Konsulate* (1929). A curious situation developed in September 1939 after the invasion of Poland by Russia.

When the Polish Ambassador in Moscow prior to his departure informed the Russian authorities of the proposed arrangement for the protection of Polish interests in Russia he was told that as Russia no longer recognised the existence of the Polish State she could not agree to another State taking over the protection of Polish property: *Polish White Book*, 1939, p. 212.

<sup>5</sup> Thus Germany detained British consuls, and Great Britain German consuls, until an agreement for exchange was made: *Parl. Papers*, Misc. No. 8 (1915), Cmd. 7857. After the outbreak of the war with Germany in September 1939 nearly four months elapsed before the last batches of consular officials and their families returned, respectively, to Great Britain and Germany.

<sup>6</sup> Details in Garner, i. §§ 34-36.

<sup>7</sup> See, for instance, Phillimore, iii. § 530, and Twiss, i. § 252, in contradistinction to Hall, § 125.

cancelled by war does not exist.<sup>1</sup> Neither does a uniform practice of the States exist, cases having occurred in which States have expressly declared<sup>2</sup> that they considered all treaties 'annulled through war. Thus the whole question remains as yet unsettled.<sup>3</sup> Nevertheless, a majority of writers agree on the following propositions, and the attitude of the belligerents during the World War seems to confirm their accuracy, at any rate on many points.

(a) *Treaties to which belligerents alone are parties :*

(1) The outbreak of war cancels all political treaties between the belligerents (as, for instance, treaties of alliance) which have not been concluded for the purpose of setting up a permanent condition of things.

(2) On the other hand, it is obvious that treaties specially concluded for war are not annulled (such as treaties in regard to the neutralisation of certain parts of the territories of the belligerents).

(3) Political and other treaties concluded for the purpose

<sup>1</sup> The Courts of the United States have since the World War given a number of instructive decisions on this question: *Hughes v. Techt*, 254 U.S. 643; Dickinson, *Cases*, p. 1116; *Annual Digest*, 1919-1922, Case No. 271; *State of Kansas v. Reardon*, 120 Kansas, 614; *Annual Digest*, 1925-1926, Case No. 332; *McCandless v. United States*, 25 F (2nd) 71; *Annual Digest*, 1927-1928, Case No. 363; *Karnuth v. United States*, 279 U.S. 231; Hudson, *Cases*, p. 977; *Annual Digest*, 1927-1928, Case No. 364. There has been a tendency to enforce the provisions of treaties whose continuance is 'compatible with a state of hostilities' (Cardozo, J., in *Hughes v. Techt*, *supra*): *Goos v. Brocks et al.*, *Annual Digest*, 1929-1930, Case No. 279; *The Sophie Rickmers*, *ibid.*, Case No. 280.

<sup>2</sup> As, for instance, Spain in 1898, at the outbreak of the war with the United States of America (see Moore, v. pp. 375-380), and Turkey in 1911, at the outbreak of her war with Italy.

<sup>3</sup> See literature collected by Hurst in *B.Y.*, 1921-1922, pp. 37-47, where he suggests that 'the true test as to

whether or not a treaty survives an outbreak of war between the parties is to be found in the intention of the parties at the time when the treaty is concluded'; and Temperley, *History of the Peace Conference*, i. (1920) pp. 360-364. The Institute of International Law, at its meeting at Christiania in 1912, adopted some rules with regard to the effect of war on treaties. See *Annuaire*, xxv. (1912) p. 648; *A.J.*, vii. (1913) p. 153 (where the rules are translated); Jacomet, *op. cit.*, pp. 113-128; and Davis in the *A.S. Proceedings*, vi. (1912) pp. 124-132. See also Frisch in *Strupp, Wört.*, i. pp. 708-711; Rolin, §§ 217-231; Rühländ in *Z.I.*, xxxii. (1924) pp. 74-147; McNair in *Hague Recueil*, 1928 (ii.), pp. 496-510, and the same, *The Law of Treaties* (1938), pp. 530-551; Hyde, §§ 547-551; Tobin, *The Termination of Multipartite Treaties* (1933), pp. 13-193; Baty, pp. 433-447; Keeley in *Grotius Society*, xii. (1927) pp. 7-17. See also *Flensburger Dampfercompagnie v. The United States*, decided by the United States Court of Claims in 1932, 52 Sup. Ct. 645; *A.J.*, xxvi. (1932) p. 618; and the comment thereon by Borchard, *ibid.*, pp. 582-586.

of setting up a permanent<sup>1</sup> condition of things, including vested proprietary rights of nationals, are not *ipso facto* annulled by the outbreak of war; but nothing prevents the victorious party from imposing by the treaty of peace alterations in, or even the dissolution of, such treaties.

(4) Non-political treaties not intended to set up a permanent condition of things (such as treaties of commerce, for example) are not *ipso facto* annulled; but the parties may annul them or suspend them according to discretion.

The plan adopted in the Treaties of Peace at the end of the World War was to regard all treaties to which two belligerents were the only parties as having been annulled by the war, but to give to the victorious Power an option to revive them upon certain conditions.<sup>2</sup>

(b) *Treaties to which many States, belligerent and non-belligerent, are parties :*

(5) So-called law-making<sup>3</sup> treaties (such as the Declaration of Paris, for example) are not cancelled by the outbreak of war. The same is valid in regard to all treaties to which a multitude of States are parties (such as the International Postal Union, for example); but the belligerents may suspend their execution, so far as they themselves are concerned, in case the necessities of war compel them to do so, and they in fact did so during the World War.

The Treaties of Peace provide that only the treaties of an 'economic or technical character' therein mentioned are to be again applied between the Central Power concerned and those of the Allied and Associated Powers party thereto,<sup>4</sup> and some of them only with modification. Treaties neither economic nor technical, but to which many States

<sup>1</sup> Thus American and English courts—see *The Society for the Propagation of the Gospel v. Town of Newhaven* (1823) 8 Wheaton 464, and *Sutton v. Sutton* (1830) 1 Russ. and M. 663—have declared that Article 9 of the treaty of November 19, 1794, between Great Britain and the United States was not annulled by the outbreak of war in 1812. See Moore, v. § 779, and Westlake, ii. p. 33; see also the foreign cases dis-

cussed by Jacomet, *op. cit.*, pp. 168-179.

<sup>2</sup> See the Treaty of Peace with Germany, Article 289. Great Britain has accordingly revived certain pre-war treaties with Germany. For a number of instances see McNair, *The Law of Treaties* (1938), p. 551.

<sup>3</sup> See above, vol. i. §§ 18, 492, 555-568c.

<sup>4</sup> See above, vol. i. § 581b, where this proceeding is discussed.

are parties, are not referred to in the Peace Treaties, but the Powers correctly treat them as being again in force.

§ 100. The outbreak of war affects likewise such subjects of the belligerents as are at the time within the enemy's territory. In former times they could all at once be detained as prisoners of war, and many States, therefore, concluded in time of peace special treaties for the time of war expressly stipulating for a period during which their subjects should be allowed to leave each other's territory unmolested.<sup>1</sup> Through the influence of such treaties, which became pretty general during the eighteenth century, it became an international practice<sup>2</sup> that, as a rule, enemy subjects must be allowed a reasonable period within which to withdraw, and no instance of the former rule occurred during the nineteenth<sup>3</sup> century. Although some writers<sup>4</sup> even nowadays maintain that, according to strict law, the old rule is still in force, it may safely<sup>5</sup> be said that there is now a customary rule of International Law, according to which all such subjects of the enemy as are not real or potential members of his armed forces, or as are not likely to supply him with information of military importance, must be allowed a reasonable period for withdrawal. On the other hand, such enemy subjects as are active or reserve officers, or reservists, and the like, may be prevented from leaving, and be detained as prisoners of war; for the principle of self-preservation must justify belligerents in refusing to furnish each other with resources which increase their means of offence and defence.<sup>6</sup>

Pre-  
carious  
Position  
of Belligerents'  
Subjects  
on Enemy  
Territory.

<sup>1</sup> See a list of such treaties down to 1890 in Hall, 4th ed., § 126, p. 407, n. 1.

<sup>2</sup> See Garner, i. § 40.

<sup>3</sup> With regard to the 10,000 Englishmen who were arrested in France by Napoleon at the outbreak of war with England in 1803, and kept as prisoners of war for many years, it must be borne in mind that Napoleon did not claim a right to make prisoners of war such civilians as were at the outbreak of war on French soil. He justified his act as one of reprisals, considering that England had violated the Law of Nations by beginning hostilities with the capture of two

French merchantmen in the Bay of Audierne without a formal declaration of war. See Alison, *History of Europe*, v. p. 277, and Fauchille, § 1052.

<sup>4</sup> See Twiss, ii. § 50; Rivier, ii. p. 230; Liszt, § 57, A, 2; Holland, *Letters upon War and Neutrality*, 3rd ed. (1921), p. 45.

<sup>5</sup> See *Land Warfare*, § 12.

<sup>6</sup> See *Land Warfare*, § 13; the author's introduction to Roxburgh, *The Prisoners of War Information Bureau* (1915); Spiropoulos, *op. cit.*, pp. 62-102. The Italian War Regulations of 1938 authorise the internment of enemy aliens who are capable of bearing arms or who are



Several States, on entering the World War, allowed enemy subjects on their territory to depart within a certain time.<sup>1</sup> For example, Great Britain permitted Germans to leave up to August 10, 1914.<sup>2</sup> On the other hand, Germany and Austria-Hungary prevented all enemy subjects from departing at the outbreak of the war.<sup>3</sup> On the outbreak of the war with Germany on September 3, 1939, Great Britain allowed enemy aliens to depart up to September 9.

However that may be, a belligerent need not allow<sup>4</sup> enemy subjects to remain on his territory, although this is frequently done.<sup>5</sup> During the World War almost all the belligerents allowed enemy subjects resident within their territory to remain, and indeed in some cases compelled them, or most of them, to do so.<sup>6</sup>

In case a belligerent allows the continued residence of enemy subjects on his territory, he can, of course, impose conditions, such as an oath to abstain from all hostile acts, or a promise not to leave a certain region, and the like. Restrictions were imposed upon resident enemy aliens in almost all belligerent States during the World War.<sup>7</sup> Moreover, an enemy subject who is allowed to stay must not join the forces of his home State, or assist them in any way, if they occupy a part of the country in which he resides. If he does so, he is liable to be punished for treason<sup>8</sup> after their withdrawal.

During the World War, many belligerents not only placed likely to take up activities dangerous to the State. The same Regulations lay down that the members of the Sacred College of Cardinals are exempt from this measure (Articles 284 and 287).

<sup>1</sup> See Garner, i. §§ 44-61; Spiropulos, *op. cit.*, pp. 33-41.

<sup>2</sup> Statement issued by the Home Office on August 5, 1914. See R. v. *Ahlens* [1915] 1 K.B. 616 (prosecution of German Consul at Sunderland for assisting German subjects to return to Germany after the outbreak of war, and acquittal).

<sup>3</sup> Garner, i. § 45; Satow in the *Grotius Society*, ii. (1917) p. 8.

<sup>4</sup> See above, vol. i. § 324.

<sup>5</sup> See Spiropulos, *op. cit.*, pp. 24-46.

<sup>6</sup> See details in Garner, i. §§ 44-61,

and Held in *Strupp, Wört.*, iii. pp. 663-723. On the other hand, France expelled all Germans during the Franco-German War in 1870; the former South African Republics expelled most British subjects when war broke out in 1899; Russia, during the Russo-Japanese War, expelled Japanese from her provinces in the Far East; in May 1912, during the Turco-Italian War, Turkey decreed the expulsion of all Italians, certain classes excepted; and, during the World War, German subjects not of military age were expelled from Portugal and certain British colonies.

<sup>7</sup> Garner, *ibid.*

<sup>8</sup> See above, vol. i. § 317, where the case of *De Jager v. Attorney-General for Natal* [1907] A.C. 326 is discussed.

all enemy aliens under strict supervision, but adopted a policy of general internment. Such aliens were looked upon as a peril to the State, and were themselves in danger from mob violence when national passions waxed hot. Thus Great Britain had in the early months of the war interned only about a third of the Germans and Austrians in the United Kingdom, although Orders were made under the Aliens Restriction Act, 1914,<sup>1</sup> placing them under special restrictions. But when the torpedoing of the *Lusitania*, and the drowning of more than 1100 innocent men, women, and children so incensed public opinion that riots broke out all over the British Empire, and the lives of enemy subjects were in danger, most of them were either interned or repatriated.<sup>2</sup> France<sup>3</sup> and Germany<sup>4</sup> also resorted to general internment, but the United States did not.<sup>5</sup> After the outbreak of the war with Germany in 1939, Great Britain, in view of the large number of refugees from oppression by the German Government, instituted special tribunals charged with the task of examining individual cases.<sup>6</sup> As the result, only a small number of German nationals were interned. As the war progressed, however, increasingly wider classes of alien enemies were subjected to internment for military reasons.

§ 100a. Formerly the rule prevailed everywhere that an *Persona standi in judicio* on Enemy Territory.<sup>7</sup> restrictions see Statutory Rules and Orders, 1939, No. 994 (amending the Aliens Order, 1920).

<sup>1</sup> 4 & 5 Geo. V. c. 12.  
<sup>2</sup> As to the various agreements for the exchange and repatriation of enemy subjects unfitted for military service by age or sex or infirmity see Garner, i. §§ 45, 53.

<sup>3</sup> Garner, i. § 52.

<sup>4</sup> Garner, i. § 57.

<sup>5</sup> Garner, i. § 61. The Final Act of the Conference of July 27, 1929, regarding wounded and sick and the treatment of prisoners of war (see below, § 125) adopted a *vœu* recommending that an exhaustive study be made with a view to the conclusion of a convention regarding the condition and protection of civilians of enemy nationality in the territory of a belligerent or in occupied territory: (1931) Cmd. 3795.

<sup>6</sup> As to the obligation of registration imposed upon alien enemies over sixteen years of age and as to other

<sup>7</sup> Much confusion will be avoided in dealing with the British and American decisions if it is realised that the term 'alien enemy' is used in two senses, the application of which depends upon the purpose of the inquiry whether a given individual is or is not an alien enemy: (i) Do you wish to know whether he is liable to internment or to compulsory military service, whether it is forbidden to him to reside in a particular area, etc.? Then apply the *personal test* and ascertain his nationality. (ii) Do you wish to know whether he may bring an action in an English court, whether he may validly contract, whether you can deal with him without committing the offence of 'trading with

enemy subject had no *persona standi in judicio*, and was, therefore, *ipso facto* by the outbreak of war, prevented from either taking or defending proceedings in the courts. This rule dated from the time when war was considered such a condition between belligerents as justified hostilities by all the subjects of one belligerent against all the subjects of the other, the killing of all enemy subjects irrespective of sex and age, and, at any rate, the confiscation of all private enemy property. Since the rule that enemy subjects are entirely *ex lege* has everywhere vanished, the rule that they might not take or defend proceedings in the courts had in many countries, such as Austria-Hungary, Germany, Holland, and Italy, likewise vanished before the World War. But in Great Britain and the United States of America<sup>1</sup> the general rule that enemy subjects are prevented from taking legal proceedings<sup>2</sup> still survives, though qualified, as we shall see, by many exceptions.

Writers, however, were debating whether these two States had not incurred an obligation to alter their Municipal Law in consequence of Article 23 (*h*) of the Hague Regulations, by which it is forbidden 'to declare extinguished, suspended, or unenforceable in a court of law the rights and rights of action of the nationals of the adverse party.' Great Britain officially repudiated such an interpretation of this article in 1911, pointing out that neither the actual words used, nor their position among regulations for the operations of armies in the field, nor the circumstances of their origin, would justify such a construction.<sup>3</sup>

the enemy'? Then apply the territorial test and ascertain where he is voluntarily resident or carrying on business (*Porter v. Freudenberg* [1915] 1 K.B. 857). Thus a British or a neutral subject who is voluntarily resident in enemy territory is an alien enemy by the territorial test; and, conversely, an enemy subject who is permitted to register himself and remain in England is not an alien enemy for the purposes to which the territorial test is relevant—even if he is interned as the result of a general policy of

internment (*Schaffenius v. Goldberg* [1916] 1 K.B. 284).

<sup>1</sup> In strict law also in France.

<sup>2</sup> The leading case was *The Hoop* (1799) 1 C. Rob. 196. In *Casseres v. Bell* (1799) 8 T.R. at p. 167, the plea of alien enemy was described as 'an odious plea.'

<sup>3</sup> See above, vol. i. § 554 (11). The repudiation was contained in a letter addressed to Professor Oppenheim and made public by him. See details in Oppenheim, *The League of Nations* (1919), pp. 45-55. See also Politis in *R.G.*, xviii. (1911) pp. 249-259, and

So the question stood until the eve of the World War, when the German Government made it known that 'in view of the rule of English law' it would suspend 'the enforcement of any British demands against Germans' until reciprocity was granted.<sup>1</sup> No arrangement was made; Great Britain followed her earlier practice<sup>2</sup>; and it is very doubtful whether alien enemies in many other belligerent States enjoyed greater procedural capacity than those in the United Kingdom.<sup>3</sup> In fact, the exceptions to the English rule were, or became, such, that the disability to sue attached practically to non-resident alien enemies alone, and not even to them in all cases.

*As Plaintiff.*—In the first place, an enemy subject resident in an allied or neutral country,<sup>4</sup> or having a licence,<sup>5</sup> is not debarred from suing; and such a licence is implied, in the case of an enemy subject resident in the United Kingdom, from mere compliance with the obligatory registration order,<sup>6</sup> and is not lost through internment, in pursuance of general policy, as a civilian prisoner of war.<sup>7</sup> Secondly, an enemy subject, wherever resident, is permitted to appear in the Prize Court as a claimant whenever he believes himself entitled to 'any protection, privilege, or relief under any of the Hague Conventions of 1907.'<sup>8</sup> And there are

the literature there quoted; Kohler in *Z.V.*, v. (1911) pp. 384-393; Holland in the *Law Quarterly Review*, xxviii. (1912) pp. 94-98; Charteris in the *Juridical Review*, xxiii. (1911) pp. 307-323; Oppenheim, *Die Zukunft des Völkerrechts* (1911), pp. 30-32; Wehberg in *R.I.*, 2nd ser., xv. (1913) pp. 197-224; Strupp in *Z.I.*, xxiii. (1913) pt. ii. pp. 118-136, and in *Z.V.*, viii. (1914) pp. 57-66; Westlake, ii. pp. 83-86.

<sup>1</sup> See [1915] 1 K.B. at p. 879.

<sup>2</sup> See *Porter v. Freudenberg* [1915] 1 K.B. 857, and McNair, *Legal Effects of War* (1920), pp. 26-58; and Roxburgh in *Journal of Comparative Legislation*, 3rd ser., ii. pt. ii. (1920) pp. 269-283.

<sup>3</sup> See a discussion of the practice of the United States of America, France, and Germany in Garner, i. §§ 91-98.

<sup>4</sup> This seems correct in view of

*In re Mary, Duchess of Sutherland* (1915) 31 T.L.R. 394, and again (1921) 65 S.J. 513. For a case where the fact that two apparently neutral subjects carrying on business on neutral territory were partners in firms carrying on business in enemy and in enemy-occupied territory prevented them from suing in a Scottish court during the World War see *Van Uden v. Burrell* [1916] S.C. 391 (Scottish Court of Session).

<sup>5</sup> *The Hoop* (1799) 1 C. Rob. 196 at p. 201. And see *The Public Trustee v. Davidson* (a Scottish case), *Annual Digest*, 1925-1926, Case No. 349.

<sup>6</sup> *Princess Thurn und Taxis v. Moffit* [1915] 1 Ch. 58.

<sup>7</sup> *Schaffenius v. Goldberg* [1916] 1 K.B. 284.

<sup>8</sup> *The Möwe* [1915] P. 1 at p. 15; in *The Gutenfels* (1915) 1 B. and C.P.C. 102; the right to appear has

other exceptions.<sup>1</sup> Even where an enemy subject does fall under a disability to sue during war, a right of action which has accrued to him before the war is not extinguished, but will revive with the return of peace; and even if the Treaty of Peace does not so expressly provide,<sup>2</sup> the statutes of

extended to any convention relating to the Suez Canal, or touching the special relations in which Egypt stands to the British Government; the Privy Council decision, [1916] 2 A.C. 112, 2 B. and C.P.C. 36, does not touch this point, but there would appear to be no reason for limiting the right to claims under any particular group of conventions. Note also *The Ophelia* [1915] P. 129; 1 B. and C.P.C. 210; [1916] 2 A.C. 206; 2 B. and C.P.C. 150, where the substantial claimant was the German Government.

<sup>1</sup> See summaries in McNair, *op. cit.*, at pp. 43-45 and 54-56. Thus a non-resident alien enemy could be joined as a nominal plaintiff for the purpose of pleading (*Rodriguez v. Speyer Bros.* [1919] A.C. 59), and probably an enemy soldier or sailor who had been captured and made a prisoner of war could sue, on the authority of the old case of *Maria v. Hall* (1800) 2 B. and P. 236, on a contract for wages. The grant by the Crown of a 'licence to trade' legalises transactions within it and enables enemy subjects comprised within it to sue in an English court, either directly when resident here (*Usparicha v. Noble* (1811) 13 East 332), or apparently through an agent or trustee if resident in enemy territory (*Kensington v. Inglis* (1807) 8 East 273); see also *Feise v. Bell* (1811) 4 Taunt. 47, and *Flindt v. Scott* (1814) 5 Taunt. 674. On licences to trade generally see below, § 217. It was stated in the second edition of this book, on the authority of *Shepeler v. Durant* (1854) 14 C.B. 582, that if a defendant obtained an opportunity to plead, and if subsequently war broke out with the country of the plaintiff, the defendant may not plead that the plaintiff is prevented from suing; but see now *Heffeld v. Rechnitzer* (1914), London *Times* newspaper, December 11, 1914. It was also stated, on the authority

of *Ex parte Boussmaker* (1806) 13 Ves. 71, that an alien enemy could prove for a debt in bankruptcy; but this is no longer the law, unless he is relieved from his disability on other grounds; *Re Wilson* (1915) 84 L.J.K.B. 1893. It was also said, on the authority of *Janson v. Driefontein Consolidated Mines Limited* [1902] A.C. 484, that a defendant might waive the plea of an alien enemy. But it is probable that this would no longer be allowed. See the *dictum* of Bailhache J. in *Robinson & Co. v. Continental Insurance Co.* [1915] 1 K.B. 155 at p. 159.

The Supreme Court of the United States seems to have admitted a further exception in the case of the sum awarded in the judgment for the plaintiff alien enemy being handed over to the Custodian of Alien Property: *Birge-Forbes Company v. Heye*: 251 U.S. 317; *Annual Digest*, 1919-1922, Case No. 284. In delivering the Opinion of the Court, Mr. Justice Holmes said: 'There is nothing mysteriously noxious . . . in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side.'

<sup>2</sup> By the Treaties of Peace at the end of the World War it is stipulated that 'all periods of prescription, or limitation of right of action . . . shall be treated, in so far as regards relations between enemies, as having been suspended, for the duration of the war. They shall begin to run again at earliest three months after the coming into force of the treaty.' See Treaty of Peace with Germany, Article 300. See *Geiringer v. Swiss Bank Corporation, Oesterreichische Creditanstalt v. Geiringer*, [1940] 1 All E. R., 406, for a decision declining to order an enemy alien, whose action had been suspended as a result of the outbreak of the war, to deposit security for costs.

limitations probably do not run against him during the war.<sup>1</sup>

*As Defendant.*—Moreover, an alien enemy, whether or not he can be plaintiff, can always be made defendant,<sup>2</sup> and by the Legal Proceedings against Enemies Act, 1915,<sup>3</sup> Parliament provided a special means for serving a writ on an alien enemy outside the jurisdiction in a certain class of proceedings.

§ 101. Before the World War, following Bynkershoek,<sup>4</sup> most British and American writers and cases, and also some French<sup>5</sup> and German<sup>6</sup> writers, asserted the existence of a rule of International Law that all intercourse, and especially trading, was *ipso facto* by the outbreak of war prohibited between the subjects of the belligerents, unless it was permitted under the custom of war (as, for instance, ransom bills), or was allowed under special licences,<sup>7</sup> and that all contracts concluded between the subjects of the belligerents before the outbreak of war became extinct or suspended. On the other hand, most German, French, and Italian writers denied the existence of such a rule, but asserted the existence of another, according to which belligerents were empowered to prohibit by special orders all trade between their own and enemy subjects.

These assertions were remnants of the time when the distinction<sup>8</sup> between International and Municipal Law was

<sup>1</sup> The point is not settled, for the obiter dictum in *De Wahl v. Braune* (1856) 25 L.J. (N.S.) Ex. 343 is not decisive. For cases arising out of the World War the above-mentioned provision of the Treaties of Peace has received statutory force. See also the American case of *Hanger v. Abbot* (1867) 6 Wall. 532, and Gregory, *The Effect of War on the Operation of Statutes of Limitation* (1915). See also *McNair, op. cit.*, pp. 60, 61, 71; *In re Mary, Duchess of Sutherland* (1921) 65 S.J. 513; *Findlay v. Graaff*, *Recueil des décisions des Tribunaux Arbitraux Mixtes*, iv. (1925) p. 73; *Le Marchant v. von Louvenclou*, *ibid.*, p. 17; Hyde, ii. § 612; *Siplyak v. Davis* (1923) 276 Pa. 495; *Annual Digest*, 1923-1924, Case No. 224 (an American case).

<sup>2</sup> *Robinson & Co. v. Continental Insurance Co.* [1915] 1 K.B. 155; *McVeigh v. United States*, 11 Wall. 259; Hyde, ii. § 612.

<sup>3</sup> 5 Geo. V. c. 36—a permanent statute.

<sup>4</sup> *Questiones Juris publici*, i. c. 3: 'quamvis autem nulla specialis sit commerciorum prohibitio ipso tamen jure belli commercia esse vetita.'

<sup>5</sup> For instance, Pillet, p. 74, and Mérignhac, iii<sup>a</sup>. p. 107.

<sup>6</sup> For instance, Geffcken in his note 4 to Heffter, p. 265.

<sup>7</sup> See below, § 217.

<sup>8</sup> See above, vol. i. § 20. But in spite of everything that speaks against it, Sir Samuel Evans, in *The Panariellos* (1915) 1 B. and C.P.C. 195, again pronounced that it is a

Inter-course, especially Trading, between Subjects of Belligerents.

not, or was not clearly, drawn. International Law, being, as a rule, a law for the conduct of States only, has nothing to do directly with the conduct of private individuals, and both assertions are, therefore, nowadays untenable. As the outbreak of war brings the peaceful relations between belligerents to an end, it is within the competence of every State to enact by its Municipal Law such rules as it pleases concerning intercourse, and especially trading, between its own and enemy subjects.

And if we look at the Municipal Law of the several countries, as it stood before the World War, we find that it is to be divided into two groups. To the one group belonged those States—such as Austria-Hungary, Germany, Holland, and Italy—whose Governments were empowered by their Municipal Law to prohibit by special order all trading with enemy subjects at the outbreak of war. In these countries trade with enemy subjects was permitted to continue after the outbreak of war unless special prohibitive orders were issued. To the other group belonged those States—such as Great Britain, the United States of America, and France—whose Municipal Law declared trade and intercourse with enemy subjects *ipso facto* prohibited by the outbreak of war, but empowered the Governments to allow by special licence all or certain kinds of such trade. In Great Britain<sup>1</sup> and the United States of America it had been, since the end of the eighteenth century, an absolutely

rule of International Law that *ipso facto* by the outbreak of war all trading with the enemy is prohibited (decision affirmed in 2 B. and C.P.C. 47). Different reasons for this prohibition of intercourse across the line of war have been given, which include the abstract theory of individual hostility, the object of crippling the enemy's commerce (per Willes J. in *Esposito v. Bowden* (1857) 7 E. and B. at p. 779), and 'the danger and impossibility of permitting intimate intercourse between the subjects of enemy States' (Baty in *Law Quarterly Review*, xxxi. (1915) at p. 49).

<sup>1</sup> See *Porter v. Freudenberg* [1915] 1 K.B. 857, and besides the textbooks quoted above at the commence-

ment of § 97, Pennant, Chadwick, and Gregory in the *Law Quarterly Review*, xviii. (1902) pp. 289-296, xx. (1904) pp. 167-185, xxv. (1909) pp. 297-316; Bentwich, *The Law of Private Property in War* (1907), pp. 47-61; Phillipson, *The Effect of War on Contracts* (1909); Latifi, *Effects of War on Property* (1909), pp. 50-58; Markovitch, *Des effets de la guerre sur les contrats entre particuliers* (1912); Schuster and Strupp in *Z.I.*, xxiii. (1913) pt. ii. pp. 51, 118; Scott in the *Law Quarterly Review*, xxx. (1914) pp. 77-90, and xxxi. (1915) pp. 30-49; Baty in *Law Quarterly Review*, xxxi. (1915) p. 49; McNair, *Legal Effects of War* (1920), pp. 99-106.

settled<sup>1</sup> rule of the Common Law that, certain cases excepted, all intercourse,<sup>2</sup> and especially trading, with alien enemies became *ipso facto* by the outbreak of war illegal, unless allowed by special licence.

When the World War came, the belligerents by statute or decree supplemented or varied their Municipal Law relating to trading with the enemy. Thus Great Britain, in September 1914, passed the Trading with the Enemy Act, 1914,<sup>3</sup> forbidding (except under licence) all transactions during the war which were prohibited by Common Law, statute, or proclamation, and among them were all that would improve the financial or commercial position of a person trading or residing in an enemy country: *e.g.* paying debts to him, dealing in securities in which he was interested, handling goods destined for him or coming from him,<sup>4</sup> or contracting with him.<sup>5</sup> By a decree of September 27,

<sup>1</sup> Whereas the Admiralty Court did at all times, the Common Law Courts did not during the eighteenth century hold trading with enemy subjects to be illegal, at any rate in so far as insurance of enemy vessels and goods against capture on the part of British cruisers was concerned; see *Henkle v. London Exchange Assurance Co.* (1749) 1 Ves. 320; *Planche v. Fletcher* (1779) 1 Doug. 251; *Lavabre v. Wilson* (1779) 1 Doug. 284. It may be said that *Gist v. Mason* (1786) 1 T.R. 84, *Potts v. Bell* (1800) 8 T.R. 548, and *Furtado v. Rogers* (1802) 3 Bos. and P. 191, mark the defeat of the lax views prevailing in the Common Law Courts on the subject of trading with the enemy; the prevalence of these views seems to have been largely due to Lord Mansfield, one of whose strong points as a judge in commercial causes was his flair for the business man's point of view.

<sup>2</sup> That a British subject who, after the outbreak of war, becomes naturalised in the enemy country commits an act of treason was decided in *R. v. Lynch* [1903] 1 K.B. 444. See above, vol. i. § 306. For a case of naturalisation of an English woman by marrying an alien enemy in time of war see *Fastbender v. Att.-Gen.* [1922] 1 Ch. 232, 2 Ch. 850.

<sup>3</sup> 4 & 5 Geo. V. c. 87. See McNair, *Legal Effects of War* (1920), pp. 99-106. The British Trading with the Enemy Acts passed during the World War seem to be permanent statutes (see McNair, *op. cit.*, pp. 102-103). However that may be, it is reasonable to expect that in any future war British legislation would, at any rate at the beginning, proceed upon similar lines.

<sup>4</sup> Trading with the enemy does not become legal by the fact that goods coming from the enemy country to Great Britain, or going from Great Britain to the enemy country, are sent to their destination through a neutral country (*Moss v. Donohoe* (1916) 32 T.L.R. 343; *The Jonge Pieter* (1801) 4 C. Rob. 79). But if the goods have been bought by the subject of a neutral State *bona fide* by himself and are afterwards shipped through neutral territory to the enemy, it is not a case of trading with the enemy; see *The Samuel* (1802) 4 C. Rob. 284 (n.).

<sup>5</sup> It had long been the British rule that all contracts entered into during a war with alien enemies without a special licence are illegal, invalid, and can never be enforced; but, prior to the Trading with the Enemy Act, 1914, and the proclamation thereunder, two exceptions to it



1914,<sup>1</sup> France, after a preamble reciting that, according to a well-established rule of International Law, war of itself prohibited all commerce with the enemy, expressly forbade all trade with enemy subjects or persons residing in an enemy country, all contracts (*tout acte ou contrat*) with such persons, and the discharge for their benefit of obligations, pecuniary or otherwise, resulting from 'tout acte ou contrat passé.'<sup>2</sup> Germany, by an ordinance of September 30, 1914, prohibited all payments to persons resident in the British Empire, and the ban was extended later to persons resident in other enemy countries. But German law admitted trading with the enemy in so far as it was not expressly forbidden, and legislation in Germany against such trading seems to have been less rigorous than in Great Britain or France.<sup>3</sup> The United States, by the Trading with the Enemy Act of October 6, 1917,<sup>4</sup> prohibited all trading or contracting with persons resident or doing business in an enemy country, all payments to such persons, and all business or commercial communication with them.

On the outbreak of the war with Germany in 1939 a very comprehensive definition of trading with the enemy was laid down in the British Trading with the Enemy Act, 1939.<sup>5</sup> That definition included, in general, any person who 'has had any commercial, financial, or other intercourse or dealing with, or for the benefit<sup>6</sup> of, any enemy.'<sup>7</sup> In particular it includes any person who: (1) has supplied any goods to or for the benefit of an enemy, or obtained any goods from an enemy, or traded in, or carried, any goods consigned to or from an enemy or destined for or coming from enemy

had been recognised: (1) where the contract was entered into in order to supply the needs of a British prisoner of war in France (*Antoine v. Morshead* (1815) 6 Taunt. 237); (2) where it was in order to supply an invading English army or the English fleet (*The Madonna delle Grazie* (1802) 4 C. Rob. 195).

<sup>1</sup> Text in 42 *Clunet* (1915), p. 103.

<sup>2</sup> See Garner, i. §§ 162-163.

<sup>3</sup> See Garner, i. §§ 164-167.

<sup>4</sup> A.J., xii. (1918), Suppl., p. 27.

<sup>5</sup> 2 & 3 Geo. VI. c. 89, ss. 1, 4, and 6.

<sup>6</sup> The result of the latter term is that the notion of trading with the enemy may now cover a contract between two persons resident in Great Britain or a contract between a person resident in Great Britain and one resident in a neutral country.

<sup>7</sup> As to the definition of the term 'enemy' see above, pp. 219-222.

territory<sup>1</sup>; (2) has paid or transmitted any money, negotiable instrument or security for money to or for the benefit of an enemy or to a place in enemy territory; (3) has performed any obligation to, or discharged any obligation of, an enemy; (4) has contravened the provisions of the Act concerning the transfer of negotiable instruments and choses in action by enemies; (5) purchases enemy currency.

§ 101a. A by-product of this prohibition of intercourse which International Law sanctions or, according to another view, itself enjoins, is the legal effect of war upon contracts between persons separated by the line of war. Within general limits which have not yet been clearly defined, International Law recognises the competence of each State to regulate this matter by its own Municipal Law. We are not now concerned with contracts between a British subject and an enemy subject both resident in Great Britain, for the latter is not an 'alien enemy' in the territorial sense<sup>2</sup>; but our province is to determine the effect of war upon contracts between persons resident in Great Britain, of whatever nationality, and persons voluntarily resident or carrying on business on enemy territory, of whatever nationality they may be. The following is an attempt at a brief summary of the main principles which the English courts have evolved.<sup>3</sup>

(a) *Contracts made and broken before the war.*—Here a

<sup>1</sup> It is laid down in § 15 that 'enemy territory' means any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at war. Such territory, however, does not include an area occupied by Great Britain or a Power allied with her.

<sup>2</sup> See above, § 100a (note on 'Alien Enemy').

<sup>3</sup> For details see Trotter, *op. cit.*, Campbell, *op. cit.*, McNair, *op. cit.*, and in *Law Quarterly Review*, 56 (1940), pp. 173-207. As to the Municipal Law in other countries see Garner, i. §§ 168-171 and 173-174, and the following: Hyde, ii. §§ 608-614; Audinet in *R.G.*, xxviii. (1920) pp. 289-358; Wertheimer, *Das Vertrags-*

*kriegsrecht des In- und Auslandes* (1917); Signorel, *Le statut des sujets ennemis* (1916); Curti, *Handelsverbot und Vermögen im Feindesland* (1916); Eccard, *Biens et intérêts français en Allemagne et en Alsace-Lorraine pendant la guerre* (1917); Scholz, *Privateigentum im besetzten und unbesetzten Feindeslande* (1919); Clunet in 46 *Clunet* (1919), pp. 945-953; Isay, *Die privaten Rechte und Interessen im Friedensverträge* (3rd ed., 1923), §§ 103-157; *Report of the 37th Conference of the International Law Association* (1932), pp. 89-121. See also a collective work entitled *Der Wirtschaftskrieg*, in 5 parts (Great Britain, Russia, Japan, France, United States), ed. by Institut für Seeverkehr und Weltwirtschaft, Kiel (1917-1919).

right of action for breach had already accrued on the outbreak of war, and the enforceability of that right of action depends upon the rules concerning *persona standi in judicio* already discussed.<sup>1</sup> As a general rule the alien enemy (in the territorial sense) cannot become a plaintiff in a British court during the war, but may be made a defendant; when the war is over, his suspended right of action revives and may be enforced; possibly, if not probably, the statutes of limitation are likewise suspended during the war.<sup>1</sup>

(b) *Contracts made before, and remaining wholly or partly unperformed (executory) on, the outbreak of war.*—Here the effect of war depends upon the nature of the contract.

(i) *Abrogation.* In practice, since the performance or further performance of most of such contracts would involve the forbidden intercourse across the line of war, the commonest effect is the abrogation of the contract, that is, its dissolution or discharge. The following contracts, among others, are regarded as being in this category: agency,<sup>2</sup> partnership,<sup>3</sup> affreightment<sup>4</sup> (for instance, it would be illegal by English law for an English ship to load or unload at an enemy port), sale of goods, marine insurance, fire insurance.<sup>5</sup> Moreover, even if the contract contains an express provision suspending during a war the execution of the contract and the intercourse between the parties, it is still liable to be treated as abrogated if its continued existence so as to operate once more after the conclusion of peace

<sup>1</sup> See above, § 100a.

<sup>2</sup> This is a fair inference from principle and from the partnership case cited in the following note. See also *Maxwell v. Grünhut* (1914) 31 T.L.R. 79, and *Tingley v. Müller* [1917] 2 Ch. 144. But see *Ottoman Bank v. Jebara, L.R.* [1927] 2 K.B. 254 [1928] A.C. 269.

<sup>3</sup> *Hugh Stevenson and Sons v. A.-G. für Cartonnagen Industrie* [1918] A.C. 239. The alien enemy partner's share of the assets and the fruits which it earns during the war do not, however, belong to the British partner. And see the instructive American case *Sutherland v. Mayer*,

271 U.S. 272; *Annual Digest*, 1925-1926, Case No. 334.

<sup>4</sup> *Esposito v. Bowden* (1857) 7 E. and B. 763; *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* [1916] 1 K.B. at p. 505.

<sup>5</sup> See *Excess Insurance Company Ltd. v. Mathews*, as reported in *Annual Digest*, 1927-1928, Case No. 366. As to the effects on contracts of a state of hostilities short of war see the *E. R. Kelley* case (decided by the United States-Mexican Claims Commission), *Annual Digest*, 1929-1930, Case No. 282 (in connection with the occupation of Vera Cruz by the United States).

would be contrary to public policy by preserving to the enemy a commercial benefit, although its enjoyment is postponed.<sup>1</sup>

(ii) *Less than abrogation.* It is not possible to segregate a class of contracts and to assert with regard to them that the effect of war upon them is suspension. But there are 'certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated'<sup>2</sup>; and under which the exercise of their rights by alien enemies (in the territorial sense) are suspended during the war. Thus alien enemy shareholders (in the territorial sense) in an English company could not vote by proxy,<sup>3</sup> or receive dividends, or, it seems, transfer their shares. Upon a contract of tenancy a landlord resident in England was allowed to recover in an English court from his alien enemy tenant (in the territorial sense) rent which accrued due to him during the war<sup>4</sup>; but without doubt the right of an alien enemy landlord (in the territorial sense) to recover rent from a tenant in England during the war would be suspended. So also in the case of a life-insurance policy the rights of an alien enemy are probably in suspense.<sup>5</sup>

(c) *Contracts which it is attempted to make during, and across the line of, war.*—These are illegal, void, and unenforceable, whether they are trading contracts or not.<sup>6</sup> In almost every case such an attempt would involve the

<sup>1</sup> *Ertel Bieber & Co. v. Rio Tinto Co.* [1918] A.C. at p. 269; *In re Badische Co.* [1921] 2 Ch. 331, containing an exhaustive discussion.

<sup>2</sup> Per Lord Dunedin in *Ertel Bieber & Co. v. Rio Tinto Co.* [1918] A.C. at p. 269. See also *Hugh Stevenson & Sons v. A.-G. für Cartonnagen Industrie* [1918] A.C. 239, where the alien enemy's right to a share of the profits made by the English partner after the dissolution with the aid of the alien enemy's share of the capital was suspended during the war; and see *Tingley v. Müller* [1917] 2 Ch. 144. See also the American case *Neumond v. Farmers' Feed Co. of New York*, *Annual Digest*, 1925-1926, Case No. 336.

<sup>3</sup> *Robson v. Premier Oil Co.* [1915] 2 Ch. 124.

<sup>4</sup> *Halsey v. Löwenfeld* [1916] 2 K.B. 707.

<sup>5</sup> *Seligman v. Eagle Insurance Co.* [1917] 1 Ch. 519. For the American cases see Campbell, *Law of War and Contract* (1918), pp. 198-217.

<sup>6</sup> *Quaere*, would such a contract be necessarily regarded as null and void by international tribunals or by the courts of another country? A negative answer is indicated by the cases *Pampuri v. Tzonkoff* (Italo-Bulgarian Mixed Arbitral Tribunal), *Annual Digest*, 1925-1926, Case No. 350; and (semble) *Second Russian Insurance Company v. Miller*, 268 U.S. 552; *Annual Digest*, 1923-1924, Case No. 222.

criminal offence of 'trading with the enemy,' or an attempt thereat.

For the purposes of this section (§ 101a) enemy-occupied territory is in substantially the same position as enemy territory,<sup>1</sup> and it is probable that the 'line of war' is drawn round the enemy's territory, so that an enemy subject resident in allied or neutral territory would not be regarded by an English court as an alien enemy for this purpose.<sup>2</sup>

The Treaties of Peace prescribed certain rules for application by most of the belligerents in the World War<sup>3</sup> in order to determine the position of pre-war contracts, and these rules generally follow British practice. The governing principle was that such contracts were abrogated as from the date when trading between the parties became unlawful<sup>4</sup>; but this principle did not apply to leases, mortgages, and other important classes of contracts mentioned in the treaties.<sup>5</sup>

<sup>1</sup> *Central India Mining Co. v. Société Coloniale Anversoise* (1919) 35 T.L.R. 587. As to the effect of partial occupation of a country see *Soc. Anon. Belge des Mines v. Anglo-Belgian Agency* (1915) 2 Ch. 409 (turning on the Proclamations). See also note to Hall, § 172.

<sup>2</sup> *In re Mary, Duchess of Sutherland*, cited above in § 100a (n.).

<sup>3</sup> Article 299 (c) of the Treaty of Versailles excluded the United States of America, Brazil, and Japan from certain articles of that treaty. Subsequently the United States, who did not ratify that treaty, made a separate agreement with Germany by the Treaty of Berlin of August 25, 1921.

<sup>4</sup> 'Except in respect of any debt or other pecuniary obligation arising out of any act done or money paid thereunder.' See Article 299 of the Treaty of Versailles.

<sup>5</sup> As to the practice of the Mixed Arbitral Tribunals see Teyssaire and Solere in *R.I. (Paris)*, vii. (1931) pp. 529-554. See the following literature for details as to the effect of the Peace Treaties on Contracts and Property: Picciotto and Wort, *Treaty*

*of Peace with Germany, 1919 (Clauses affecting Mercantile Law)* (1919); Fletcher Moulton in *Journal of Comparative Legislation*, 3rd ser., ii. (1920) pp. 64-76; Simonson, *Private Property and Rights in Enemy Countries* (1921); Roxburgh in *Law Quarterly Review*, xxxvii. (1921) pp. 46-62; Scobell-Armstrong, *War and Treaty Legislation* (1922); Schuster in *B.Y.*, 1920-1921, pp. 167-189; Hays, *Enemy Property in America* (1923); Gidel et Barrault, *Le traité de paix avec l'Allemagne du 28 juin et les intérêts privés* (1921); Partsch, *Die Auflösung der Vorkriegsverträge nach Art. 299a des Vertrages von Versailles*, Z.I., xxix. (1921) pp. 295-328; Grimm, *Die Einwirkung des Krieges auf internationale Lieferungsverträge* (1922), and in Z.I., xxv. (1922-1923) pp. 35-61; Isay, *Die privaten Rechte und Interessen im Friedensverträge* (3rd ed., 1923); Fuchs, *Die Grundsätze des Versailler Vertrags über die Liquidation und Beschlagnahme deutschen Vermögens im Auslande* (1927).

The English text of Article 299 of the Treaty of Versailles speaks of pre-war contracts as 'dissolved,' and the French text uses the word 'annulés,' which seems to be different;

§ 102. In former times belligerents could confiscate all private and public enemy property, immovable or moveable, on each other's territory at the outbreak of war, and also enemy debts; and the treaties<sup>1</sup> concluded between many States for the withdrawal of their subjects at the outbreak of war provided likewise for the unrestrained withdrawal of the private property of their subjects. Through the influence of such treaties, an international usage and practice grew up that belligerents should neither confiscate private enemy property on their territory nor annul debts due to enemy subjects. The last case<sup>2</sup> of confiscation of private property was that of 1793, at the outbreak of war between France and Great Britain. No case of confiscation occurred during the nineteenth century. However, it is controversial to what extent that practice has definitely crystallised into a customary rule of International Law prohibiting the confiscation of *private* enemy property on the territory of a belligerent and the annulment of debts due to enemy subjects.<sup>3</sup> In any case, such a rule would not prevent a

Position  
of Belligerents'  
Property  
in the  
Enemy  
State.

for dissolution suggests the time of the outbreak of war and annulment the time of the Treaty—see Partsch, *op. cit.*

As to shares and stocks in neutral corporations held by enemy subjects and corporations, and evidenced by certificates being in Great Britain on the outbreak of war, see the litigation arising out of the shares of the United States Steel Corporation claimed by the British Custodian of Enemy Property, in *A.J.*, xix. (1925) pp. 369-374.

<sup>1</sup> See above, § 100; Moore, vii. § 1196; Scott, *Conferences*, pp. 559-563; Turlington in *A.J.*, xxii. (1928) pp. 270-291.

<sup>2</sup> See, however, the action of the Confederate Government in the American Civil War, which can hardly be called an example of confiscation in international war; see Lawrence, § 172, and Halleck, i. p. 589 (n.).

<sup>3</sup> In the case of *In re Ferdinand, Ex-Tsar of Bulgaria* (1921) 1 Ch. 107, Lord Sterndale, M.R., at p. 125, stated his opinion that if the view, expressed in the previous editions of

this work, as to the obsolescence of the right of confiscation be intended to extend to the Crown right to seize the private property of enemy subjects on its territory in particular instances (as opposed to a general confiscation), then in his opinion it was incorrect. (In that case the Court of Appeal held that the common-law right of the British Crown to seize and forfeit the private property of enemy subjects on its territory still existed, though it was at any rate temporarily placed in abeyance by the inconsistent machinery of the Trading with the Enemy Acts.) The point is discussed at length in the arguments and judgments in that case, and by Farrer, counsel for the ex-Tsar, in *Law Quarterly Review*, xxxvii. (1921) pp. 218-241 and 337-362. It appears that the ex-Tsar Ferdinand's property went out of the frying-pan into the fire; that is, instead of being 'forfeited' at common law, it was 'retained' under the Bulgarian Peace Treaty (see Mullins, *op. cit.*). In favour of the view that the right of confiscation is obsolete may be mentioned Lord Parker in *The Roumanian* [1916]

belligerent from seizing *public* enemy property on his territory, such as funds, ammunition, provisions, rolling stock of enemy State railways, and other valuables; from preventing the withdrawal of private enemy property which may be made use of by the enemy<sup>1</sup> for military operations, such as arms and munitions; from seizing and using rolling stock belonging to private enemy railway companies, and other means of transporting persons or goods, and appliances for the transmission of news, although they are private enemy property, provided all these articles are restored, and indemnities are paid for them, after the conclusion of peace<sup>2</sup>; or from suspending the payment of debts due to enemy subjects till after the conclusion of peace in order to prevent the increase of the resources of the enemy.

The rule that private property on land is not liable to confiscation guided the policy of the belligerents in the early stages of the World War. Thus the British Trading with the Enemy (Amendment) Act, 1914,<sup>3</sup> created a custodian

1 A.C. at p. 135, 1 B. and C.P.C. at p. 545; and in the *Daimler Case* [1916] 2 A.C. at p. 347; Lord Finlay and Lord Haldane in *Hugh Stevenson & Sons' Case* [1918] A.C. at p. 245 and p. 247, and Lord Birkenhead in *Fried. Krupps v. Orconera Iron Ore Co.* (1919) 88 L.J. (Ch.) at p. 309; (*semble*) *Lieben's Estate v. Custodian of Enemy Property* (a South African case), *Annual Digest*, 1925-1926, Case No. 344; an *obiter dictum* in a Scottish case, *Public Trustee v. Davidson*, *ibid.*, Case No. 345; Hyde, ii. §§ 621-623; Bouvé in *A.S. Proceedings*, 1926, pp. 14-25; and Borchard in *A.J.*, xviii. (1924) pp. 523-532, and xxii. (1928) pp. 636-641. In favour of the right of confiscation see the arguments and judgments in the *Ex-Tsar Ferdinand's Case*, and Hall, § 144; Mullins in *Grotius Society*, viii. (1923) pp. 89-106; Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929), pp. 188-208. English law does not recognise the process of the obsolescence of a rule of law; actual repeal by statute is necessary. As to the United States, see Report to the Senate on the Settlement of War Claims Bill of 1928: Sen. Doc., 70th Congress, 1st Session, Report No. 273.

For the view of the German *Reichsgericht* see *M. v. Aktieselskabet*, *Annual Digest*, 1933-1934, Case No. 217. The Italian War Regulations of 1938 provide that private enemy property may be requisitioned against payment of compensation or put under a régime of compulsory sequestration and administration (Articles 294 and 295).

<sup>1</sup> The reciprocal indulgence granted to enemy merchantmen in Russian and Japanese ports at the outbreak of the war in 1904, to leave unmolested within a certain time, was conditional upon there being no contraband in the cargoes. See Lawrence, *War*, p. 52.

<sup>2</sup> As the seizure of all these articles is, according to Article 53 of the Hague Regulations, permissible in occupied enemy country, provided they are restored and indemnities paid after the conclusion of peace, seizure must likewise—under the same conditions—be permissible in case these articles are on the territory of a belligerent. As regards rolling stock belonging to private enemy railway companies see Nowacki, *Die Eisenbahnen im Kriege* (1906), § 15.

<sup>3</sup> 5 Geo. V. c. 12.

of enemy property whose general duty it was to receive dividends<sup>1</sup> and other sums which became payable to enemies, invest them, and hold them (subject to the payment of debts in certain cases) until the end of the war. But the desire to eliminate the financial and commercial influence of the enemy, and other motives, presently led in most States to exceptional war measures against the businesses and property of enemies, which, though not confiscation, inflicted great loss and injury. Sometimes these measures stopped short of divesting the enemy ownership of the property; but in other cases the businesses or property were liquidated, and were represented at the close of hostilities by nothing else than the proceeds of their realisation, often enough out of all proportion to their value.<sup>2</sup> In the Trading with the Enemy Act, 1939,<sup>3</sup> provision was made for the appointment of custodians of enemy property in order to prevent the payment of money to enemies and to preserve enemy property in contemplation of arrangements to be made at the conclusion of peace.

The readjustment of rights of private property on land was provided for by the Treaties of Peace. The general principles underlying their complicated arrangements were that the validity of all completed war measures was reciprocally confirmed; but that while uncompleted liquidations on the territories of the Central Powers were to be discontinued, and the subjects of the victorious Powers were to receive compensation for the loss or damage inflicted on their property by the emergency war measures, the property of subjects<sup>4</sup> of the vanquished Powers on the

<sup>1</sup> *Aramayo Francke Mines v. Public Trustees* [1922] 2 A.C. 406.

<sup>2</sup> For details see Garner, i. §§ 62-79, and McNair, *Legal Effects of War* (1920).

<sup>3</sup> § 7. By virtue of paragraph 5 of the Trading with the Enemy (Custodian) Order, 1939, companies incorporated in the United Kingdom or having a share transfer or registration office there were put under a duty to communicate to the Custodian of Enemy Property all shares, debentures, and other securities held by or for the benefit of the enemy. By

the same Order the Board of Trade were empowered to vest in the Custodian enemy property or the right to transfer enemy property.

<sup>4</sup> For the interpretation of the term 'German national' in Article 297 of the Treaty of Versailles and the corresponding term in the Austrian Peace Treaty and the ensuing Treaty of Peace Order in Council, 1919, see *Stoeck v. Public Trustees* [1921] 2 Ch. 67; *In re Chamberlain's Settlement* [1921] 2 Ch. 533; *Fasbender v. A.G.* [1922] 1 Ch. 232, 2 Ch. 850; *Rothschild's Case* [1923] 2 Ch. 542; *Kramer*



territories of the Allied and Associated Powers might be retained and liquidated, and the owner was to look for compensation to his own State. The proceeds of the realisation of such property were not to be handed over to him, or to his State, but were to be credited to his State as a payment on account of the sums payable by it under the treaties.<sup>1</sup> Between some States, Great Britain and Germany for example, clearing offices were established for the collection and payment of pre-war debts,<sup>2</sup> and Mixed Arbitral Tribunals were constituted for the purpose of deciding questions relating to debts, contracts, property, rights, and interests, and certain other matters arising under the Treaties of Peace.<sup>3</sup>

v. A. G. [1923] A.C. 528; *Baron Reitzes de Marienwert's Case* [1924] 2 Ch. 282; *Hahn v. Public Trustee* [1925] 1 Ch. 715; *Pauly v. Custodian of Enemy Property* (decided by the Supreme Court of South Africa), *Annual Digest*, 1919-1922, Case No. 157; *Leo W. M. Baumfelder v. Secretary of State for Canada*: Canada Law Reports [1927] Exch. 86; *Annual Digest*, 1927-1928, Case No. 372, and a number of decisions of the Anglo-German Mixed Arbitral Tribunal. As to the nationality of corporations under the Treaty of Versailles see *B.Y.*, 1922-1923, pp. 186-188.

<sup>1</sup> For example, Articles 297-298 of the Treaty of Versailles.

<sup>2</sup> *Ibid.*, Article 296; Charteris, *Constitution and Organisation of the Clearing Office (Enemy Debts)*, in *Journal of Comparative Legislation*, 3rd ser., iii. (1921) pp. 31-39. See also the Reports of the Controller of the Clearing Office (Germany) and the Administrator of German, Austrian, Hungarian, and Bulgarian Property, published by H.M. Stationery Office, particularly the Reports of the Legal Adviser contained in the Appendices of these documents, where a summary of the principal decisions of the Mixed Arbitral Tribunals will be found. On July 26, 1932, an agreement was concluded between Great Britain and Germany for the provisional dissolution of the Mixed Arbitral Tribunal. Previously, Great Britain, in order to alleviate hardships, released large

parts of certain specified categories of liquidated German property on the recommendation of a committee under the chairmanship of Lord Blanesburgh specially set up for that purpose. See Cmd. 2046 [1924]; Weiser in *Z.I.*, xlii. (1930) pp. 208-230. In December 1929 the British and German Governments concluded an agreement providing for the release of German property not liquidated or finally disposed of at the date of the Agreement: Treaty Series, No. 21 [1930]. See also the United States Settlement of War Claims Act of 1928, providing for the return to German owners of all property held by the Alien Property Custodian, and for submission to an arbitrator of the claims of the German owners of merchant-vessels and patents requisitioned by the United States during the war. See *A.J.*, xxii. (1928), Suppl., p. 40, and Borchard, *ibid.*, pp. 373-379.

<sup>3</sup> As to the Mixed Arbitral Tribunals see Zitelmann in *Z.I.*, xxix. (1921) pp. 248-262; Ruzé in *R.I.*, (1922), 3rd ser., iii. pp. 22-66; Strupp in *A.J.*, xvii. (1923) pp. 661-690; *B.Y.*, 1931, pp. 135-142. As to the American-German Mixed Claims Commission see Borchard in *A.J.*, xxi. (1927) pp. 472-480. And as to the Austrian and Hungarian Debt Claims see Borchard, *ibid.*, xxii. (1928) pp. 142-146. As to the Anglo-Turkish Mixed Arbitral Tribunal see Hill in *Juridical Review*, September, 47 (1935), pp. 241-252; as to the

Enemy property found by a belligerent on one of his own merchantmen does not enjoy any immunity from confiscation, since enemy private property at sea,<sup>1</sup> unlike private property on land, is liable to capture everywhere except on a neutral vessel. Accordingly, during the World War, British Prize Courts in several cases condemned enemy goods on British merchantmen, whether seized before or after they had been landed in British ports.<sup>2</sup>

Further, enemy goods discharged before the outbreak of war into a bonded warehouse in a British port, and found in bond at the outbreak of war, are still considered by British practice as sea-borne.<sup>3</sup>

§ 102a. In former times International Law empowered States when war was impending, or at its outbreak, to lay an embargo upon all enemy merchantmen in their harbours in order to confiscate them.<sup>4</sup> Further, enemy merchantmen

Effect of the Outbreak of War on Merchantmen.

Turkish-Greek Tribunal see Boeg in *Nordisk T.A.*, 8 (1937), pp. 3-18. See also Schätzel, *Das deutsch-französische gemischte Schiedsgericht* (1930); the same, *Die gemischten Schiedsgerichte der Friedensverträge in Jahrbuch des öffentlichen Rechts*, xviii. (1930) pp. 378-455; Blühdorn in *Hague Recueil*, 1932 (iii.), pp. 141-239; Hart, *The Mixed Arbitral Tribunals* (a lecture, 1932); Schmid and Schmitz in *Z.S.V.*, ii. (1931) pp. 17-85.

For reports of decisions see *Recueil des décisions des Tribunaux Arbitraux Mixtes: Entscheidungen der gemischten Schiedsgerichte* (Löwenfeld, Magnus, Wolff).

For summaries of the decisions see Scobell-Armstrong, *War and Treaty Legislation* (1921), Suppl. vi.; *Journal of Comparative Legislation*, iv. (1922) p. 255; v. (1923) p. 17; vi. (1924) p. 301; viii. (1926) p. 111; the Reports of the Controller of the Clearing Office; the successive issues of the *Annual Digest of Public International Law Cases*; and see preceding note.

See also, as to the effect of the Peace Treaties upon enemy property, the literature quoted in note to § 101a.

<sup>1</sup> In 1905, during the Russo-Japanese War, a Russian vessel, the *Thalia* (see Takahashi, pp. 605-620; Hurst, ii. p. 116), was seized while undergoing repairs on a Japanese

shipyard, and condemned as an enemy vessel, although, being on land beside a dock, she was not at sea. This was prior to Hague Convention VI, which forbade confiscation of enemy merchantmen in harbour at the outbreak of war. (See below, § 102a.)

<sup>2</sup> *The Miramichi* [1914] P. 71; 1 B. and C.P.C. 137; *The ten bales of silk at Port Said* (1916) 2 B. and C.P.C. 247; *The Dandolo* (1916) 2 B. and C.P.C. 339; *The Roumanian* [1914] P. 26; 1 B. and C.P.C. 75, 536; [1916] 1 A.C. 124; see Hudson in *A.J.*, xvi. (1922) pp. 375-390, and Herzog in *A.J.*, xviii. (1924) at p. 485 (n. 15). On the meaning of the term 'port' see Baty in the *Law Quarterly Review*, xxxiv. (1918) pp. 420-427, who denies that quays and dry docks are part of a port. And it matters not whether enemy cargo itself is concerned, or the proceeds of its sale after it had been sold in a British port on account of its perishable character. *The Glenroy* [1918] P. 82; 3 B. and C.P.C. 161; *The Achilles* [1919] P. 340; 3 B. and C.P.C. 632.

<sup>3</sup> *The Eden Hall* (1916) 2 B. and C.P.C. 84.

<sup>4</sup> *Lindo v. Rodney* (1781) 2 Doug. 612 (n.). See Hyde, ii. §§ 763-765; Higgins in *B.Y.*, 1922-1923, pp. 55-78; Colombos, *Law of Prize* (1926), §§ 105-123.

at sea could at the outbreak of war be captured and confiscated, although they did not even know of the outbreak of war. As regards enemy merchantmen in the harbours of the belligerents, it became, from 1854, during the Crimean War, a usage followed by some countries that no embargo<sup>1</sup> should be laid on them for the purpose of confiscating them, and that a reasonable time, so-called days of grace, should be granted them to depart unmolested; but no rule was in existence until the Second Hague Conference of 1907, which produced a Convention (VI.) 'relative to the Status of Enemy Merchant-ships at the Outbreak of Hostilities.'<sup>2</sup>

The Convention VI. distinguished between vessels in the harbours of the belligerents and vessels on the sea.

(a) *Vessels in harbour* :—

Article 1 of the Convention enacted that, in case an enemy merchant-ship is at the beginning of the war in the port of a belligerent, or, having left its last port of departure before the commencement of the war, enters a belligerent port in ignorance of its outbreak, it is *desirable* that she should be allowed freely to depart, either immediately or after a reasonable number of days of grace, and, after being furnished with a pass, to proceed direct to her port of destination, or to any other port indicated.

The usage, followed by some countries, that enemy merchantmen in the harbours of the belligerents at the outbreak of war might not be confiscated, was made a *binding rule* upon the parties by Article 2.

(b) *Vessels on the sea* :—

Enemy merchant-ships which left their last port of departure before the outbreak of war, and while still ignorant of the outbreak of war are met at sea (*en mer*) by cruisers of

<sup>1</sup> See above, § 40. See *Littlejohn & Co. v. United States* (270 U.S. 215; *Annual Digest*, 1925-1926, Case No. 369), where the Supreme Court held that, in the absence of a treaty, a State is entitled to take 'possession and title' of such ships 'without violating any uniform or commonly accepted rule of International Law.'

<sup>2</sup> See Lémonon, pp. 647-661;

Higgins, pp. 300-307; Nippold, ii. pp. 146-153; Scott, *Conferences*, pp. 556-568; Dupuis, *Guerre*, Nos. 74-81; Scott in *A.J.*, ii. (1908) pp. 280-289; Wehberg, pp. 194-200. See also Higgins in *B.Y.*, 1922-1923, pp. 55-78; Verzijl, §§ 345-347; Garner, *Prize Law*, Nos. 191-234; Pappenheimer, *Die Behandlung der feindlichen Kauffahrteischiffe bei Ausbruch der Feindseligkeiten* (1916).

the belligerents, may, according to Article 3, be captured ; they may not, however, be confiscated.

During the World War many parties to this Convention failed to observe it, and accordingly Great Britain, regarding reciprocity and a high degree of uniformity of practice as essential to its continuance, gave notice in 1925 to the Netherlands Government, in pursuance of Article 10, of the denunciation of the whole Convention (VI.). Accordingly, in the future, the law administered in a British Prize Court will be the law which was in operation before the ratification of Hague Convention VI. ; namely, that enemy merchant-ships in British ports on the outbreak of war, or encountered at sea even while still ignorant of the outbreak of war, are liable to capture and to condemnation as prize. It is improbable that the practice already mentioned of giving days of grace to enemy merchant-ships in port which was initiated during the Crimean War will continue to grow and harden into law<sup>1</sup>; at present, at any rate, it is not a rule of International Law.<sup>2</sup> In the period between 1914 and 1918, and in the subsequent years, a considerable number of cases bearing on Convention No. VI. were decided by the courts of various countries.<sup>3</sup>

§ 102b. At present no convention regulates the status of civil aircraft which happen to be on enemy territory upon the outbreak of war ; nor can it be said that any customary rule exists. The proposed Air Warfare Rules of 1923 provide (Article 52) that ' enemy private aircraft are liable to capture in all circumstances.' The analogy of maritime warfare indicates confiscation,<sup>4</sup> unless days of grace are given.

<sup>1</sup> See below, § 188.

<sup>2</sup> *The Blonde* [1921] P. at p. 161 ; [1922] 1 A.C. at p. 326. It is believed that the anticipatory embargo, referred to above, § 40, may be regarded as obsolete, even when Hague Convention VI. does not apply. See the condemnation by Sir Travers Twiss cited in Hall, § 122 ; Higgins in *B.Y.*, 1922-1923, at pp. 55-56 ; Hall, § 148.

<sup>3</sup> These cases were duly noted in the previous edition of this work. See also *The Batori* [1933] P. 22 ; [1934] A.C. 91.

<sup>4</sup> See above, § 102a. Spaight advances cogent arguments in support of the view that the belligerent in whose territory enemy civil aircraft

may be found on the outbreak of war should be at liberty to confiscate them ; having regard to the ready adaptation of civil aircraft for military purposes, it is unreasonable to expect that a belligerent will do anything else : *Air*, pp. 372-376. It is not clear how far the subject is covered by the Prize Act, 1939 (see below, p. 732), which makes Prize Law applicable to aircraft. According to the Italian War Regulations of 1938 private enemy aircraft which at the beginning of the war is in Italian territory must not be confiscated. It may be retained and requisitioned for the duration of the war (Article 242).

Effect of the Outbreak of War upon Enemy Civil Aircraft.

# CHAPTER III

## WARFARE ON LAND

### I

#### ON LAND WARFARE IN GENERAL

Vattel, iii. §§ 136-138—Hall, §§ 184-185—Phillimore, iii. § 94—Taylor, § 469—Wheaton, § 342—Bluntschli, §§ 534-535—Heffter, § 125—Lueder in *Holtzendorff*, iv. pp. 388-389—Gareis, § 84—Fauchille, §§ 1078-1079—Pradier-Fodéré, vi. Nos. 2734-2741—Longuet, § 41—Pillet, pp. 85-89—*Kriegsbrauch*, p. 9—*Land Warfare*, § 39—Holland, *War*, Nos. 1-15—Butler and Maccoby, *The Development of International Law* (1928), pp. 124-142.

Aims and  
Means of  
Land  
Warfare.

§ 103. The purpose of war, namely, the overpowering of the enemy, is served in land warfare through two aims<sup>1</sup>—first, defeat of the enemy armed forces on land, and, secondly, occupation and administration of the enemy territory. The chief means by which belligerents try to realise those aims, and which are always decisive,<sup>2</sup> are the different sorts of force applied against enemy persons. But besides such violence against enemy persons, there are other means which are far from being unimportant, although they play a secondary part only. Such means are: appropriation, utilisation, and destruction of enemy property; siege; bombardment; assault; espionage; utilisation of treason; ruses.

Lawful  
and  
Unlawful  
Practices  
of Land  
Warfare.

§ 104. But—to use the words of Article 22 of the Hague Regulations—‘the belligerents have not an unlimited right as to the means they adopt for injuring the enemy.’ The principles of chivalry and of humanity have been at work for many hundreds of years to create these restrictions, and their work is not yet at an end.<sup>3</sup>

<sup>1</sup> Aims of land warfare must not be confounded with ends of war; see above, § 66.

<sup>2</sup> But the cumulative effects of

the economic weapon in the World War must not be overlooked. See Spaight, *Commerce*, pp. 1-21, 73-87.

<sup>3</sup> See, however, above, § 67.

§ 105. In a sense, all means of warfare are directed against one object only—namely, the enemy State, which is to be overpowered by all legitimate means. Apart from this, the means of land warfare are directed against several objects.<sup>1</sup> Such objects are chiefly the members of the armed forces of the enemy, but likewise, although in a lesser degree, other enemy persons; further, private and public property, fortresses, and roads.

Objects  
of the  
Means of  
Warfare.

§ 106. Land warfare must be distinguished from sea warfare chiefly for two reasons. First, their circumstances and conditions differ widely, and, therefore, their means and practices also differ. Secondly, the law-making conventions which deal with warfare rarely deal with land and sea warfare at the same time, but generally treat them separately. Thus, whereas some conventions deal exclusively with warfare on sea, the Hague Regulations (Convention IV.) deal exclusively with warfare on land.<sup>2</sup>

Land  
Warfare  
in contra-  
distinction  
to Sea  
Warfare.

## II

### VIOLENCE AGAINST ENEMY PERSONS

Grotius, iii. c. 4 and c. 11—Vattel, iii. §§ 139-159—Hall, §§ 128, 129, 185—Westlake, ii. pp. 76-83—Lawrence, §§ 161, 163, 166-169—Maine, pp. 123-148—Manning, pp. 196-205—Phillimore, iii. §§ 94-95—Halleck, ii. pp. 14-26—Moore, vii. §§ 1111, 1119, 1122, 1124—Hershey, Nos. 375-380—Taylor, §§ 477-480—Walker, § 50—Wheaton, §§ 343-345—Bluntschli, §§ 557-563—Heffter, § 126—Lueder in *Holtzendorff*, iv. pp. 390-394—Gareis, § 85—Klüber, § 244—Liszt, § 59—G. F. Martens, ii. § 272—Ullmann, § 176—Fauchille, §§ 1077 (2), 1077 (3), 1081-1084, 1090, 1141, 1142—Despagnet, Nos. 525-527—Mérignac, iii<sup>a</sup>. pp. 240-270—Pradier-Fodéré, vi. Nos. 2742-2758—Rivier, ii. pp. 260-265—Nys, iii. pp. 144-148—Calvo, iv. §§ 2098-2105—Fiore, iii. Nos. 1317-1320, 1342-1348, and *Code*, Nos. 1481-1488—Martens, ii. § 110—Longuet, §§ 42-49—Pillet, pp. 85-95—Kohler, §§ 81-83—Suarez, §§ 363, 364, 371, 374—Gemma, pp. 291-309, 315-319—Rolin, §§ 281-294—Mérignac-Lémonon, i. pp. 143-172—Hyde, ii. §§ 655, 660-664—Spaight, *Land*, pp. 73-156—Spaight, *Air*, pp. 161-194—Holland, *War*, pp. 70-76, and *Lectures*, pp. 286-328—Keith's Wheaton, pp. 745-756—

<sup>1</sup> See Oppenheim, *Die Objekte des Verbrechens* (1894), pp. 64-146, where the relation of human actions to their objects is fully discussed.

<sup>2</sup> As to aerial warfare see below,

§§ 214a-214f. And as to the relation of the law governing that warfare to the law of land and sea warfare respectively see Spaight, *Air*, pp. 31-39.

Zorn, pp. 127-161—Bordwell, pp. 278-283—Meurer, ii. §§ 30-31—*Kriegsbrauch*, pp. 9-11—*Land Warfare*, §§ 39-53—Garner, i. §§ 175-190—Balladore Pallieri, pp. 189-202—Schultze in *Z.I.*, xxvii. (1918) pp. 1-39.

On  
Violence  
in general  
against  
Enemy  
Persons.

§ 107. As war is a contention between States for the purpose of overpowering each other, violence consisting of different sorts of force applied against enemy persons is the chief and decisive means of warfare. These different measures of force are used against both combatants and non-combatants, but with discrimination and differentiation. The purpose of the application of violence against combatants is their disablement so that they can no longer take part in the fighting; and this purpose may be realised through killing or wounding them, or making them prisoners. But to non-combatant members of armed forces, private enemy persons showing no hostile conduct, and officials in important positions, only minor means of force may as a rule be applied, since they do not take part in the armed contention of the belligerents.

Killing  
and  
Wound-  
ing of  
Com-  
batants.

§ 108. Every combatant may be killed or wounded, whether a private soldier or an officer, or even the monarch or a member of his family. Some writers <sup>1</sup> assert that it is a usage of warfare not to aim at a sovereign or a member of his family. Be that as it may, there is in strict law <sup>2</sup> no rule preventing the killing and wounding of such illustrious persons. But combatants may only be killed or wounded if they are able and willing to fight or to resist capture. Therefore, combatants disabled by sickness or wounds may not be killed. Further, such combatants as lay down their arms and surrender, or do not resist being made prisoners, may neither be killed nor wounded, but must be given quarter. These rules are universally recognised, and are now expressly enacted by Article 23 (c) of the Hague Regulations, although the fury of battle frequently makes individual fighters <sup>3</sup> forget and neglect them.

<sup>1</sup> See Klüber, § 245; G.F. Martens, ii. § 278; Heffter, § 126.

<sup>2</sup> Vattel, iii. § 159. The example of Charles XII. of Sweden (quoted by Vattel), who was intentionally fired at by the defenders of the fortress of Thorn, besieged by him,

and who said that the defenders were within their right, ought to settle the point.

<sup>3</sup> See Baty, *International Law in South Africa* (1900), pp. 84-85, and the many charges made by belligerents in the World War against their

§ 109. However, the rule that quarter must be given has exceptions. Although it has of late been a customary rule of International Law, and although the Hague Regulations now expressly stipulate by Article 23 (*d*) that belligerents are prohibited from declaring that no quarter will be given, quarter may nevertheless be refused, firstly, to members of a force who continue to fire after having hoisted the white flag as a sign of surrender, and, secondly, by way of reprisal<sup>1</sup> in kind for refusal of quarter by the other side.<sup>2</sup> The former rules that quarter could be refused to the garrison of a fortress carried by assault, to the defenders of an unfortified place against an attack of artillery, and to a weak garrison which obstinately and uselessly persevered in defending a fortified place against overwhelming enemy forces, are now obsolete.

Refusal of  
Quarter.

§ 110. As already mentioned, Article 22 of the Hague Regulations stipulates expressly that the right of belligerents to adopt means of injuring the enemy is not unlimited. Some means are expressly prohibited by treaties; others are condemned by custom.<sup>3</sup> But apart from those expressly prohibited by treaties or by custom, all means of killing and wounding that exist, or may be invented, are lawful. And it matters not whether the means used are directed against single individuals, as are swords and rifles, or against

Lawful  
and  
Unlawful  
Means of  
Killing  
and  
Wound-  
ing Com-  
batants.

adversaries. In *The Llandovery Castle* (Annual Digest, 1923-1924, Case No. 235) the German *Reichsgericht* held, in the course of the so-called Leipzig Trials, that the killing of enemies contrary to Article 23 (*c*) or, in similar circumstances, at sea, constitutes an offence against International Law in regard to which the defence of superior orders affords no justification. See below, § 253.

<sup>1</sup> See Pradier-Fodéré, vii. Nos. 2800-2801, who opposes this principle, but discusses the subject in a very detailed way; and Spaight, *Land*, p. 89. And see, on the recent prohibition of reprisals against prisoners of war, § 126 below.

<sup>2</sup> It is not believed that the rule which, according to the author (see 3rd edition) and some other writers, permitted the denial of quarter to

prisoners in cases where the safety of the capturing force was vitally imperilled by their continued presence has survived to this day, particularly in view of the Hague Regulations, Articles 4 to 20 and 23 (*d*), and of the fact that these Regulations are expressly declared to have been framed in the light of military necessities; see above, § 69 (*n*). See also Hyde, ii. § 664; Fauchille, § 1120; Rolin, § 300; *Land Warfare*, § 80; see, however, Payrat, *Le prisonnier de guerre* (1910), pp. 191-220; Hall, § 129. In such circumstances, prisoners, having been disarmed, should be released.

<sup>3</sup> For a valuable discussion of numerous modern devices used or foreshadowed in the World War see a chapter entitled 'Special Ammunition' in Spaight, *Air*, pp. 161-194.



large bodies of individuals, as are, for instance, shrapnel, Gatlings, and mines. On the other hand, all means are unlawful that needlessly aggravate the sufferings of wounded combatants. A customary rule of International Law, also expressly enacted by Article 23 of the Hague Regulations, prohibits, therefore,<sup>1</sup> the employment of poison and of such arms, projectiles, and material<sup>2</sup> as cause unnecessary injury.<sup>3</sup> Accordingly: wells, pumps, rivers, and the like from which the enemy draws drinking water must not be poisoned<sup>4</sup>; poisoned weapons must not be made use of<sup>5</sup>; rifles must not be loaded with bits of glass, irregularly shaped iron, nails, and the like; cannons must not be loaded with chain shot, crossbar shot, red-hot balls, and the like. Another customary rule, also enacted by Article 23 (b) of the Hague Regulations, prohibits any treacherous way of killing and wounding combatants. Accordingly: no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted.

Explosive  
Bullets.

§ 111. In 1868 a conference met at St. Petersburg for the examination of a proposal made by Russia with regard to

<sup>1</sup> See the comment of Spaight, *Air*, p. 161, on this passage.

<sup>2</sup> In 1915, during the World War, the Germans used so-called 'flame projectors'—see details in Garner, i. § 189—which threw burning liquid on the combatants of the enemy. There is no doubt that this practice is unlawful, because it causes 'unnecessary injury.' As to air darts (*fléchettes*) see Spaight, *Air*, pp. 172-174, who considers them legitimate.

<sup>3</sup> As to the controversy between the United States and Germany during the World War whether shot-guns were arms of this category, see Garner, i. § 179, and Fauchille, § 1082.

<sup>4</sup> Is it lawful to poison the drinking water, provided a notice is posted up informing the enemy that the

water has been poisoned? The German commander in South-West Africa attempted to justify such a practice during the World War; but it must be condemned. See Parl. Papers, Cmd. 8306, pp. 74-78, and Garner, i. § 190.

<sup>5</sup> The diffusion of poisonous and asphyxiating gases from cylinders or otherwise than by projectiles (which is discussed below, § 113)—a practice instituted by the Germans during the World War (see details in Garner, i. §§ 180-183)—whether or not within the prohibition of the use of 'poison or poisoned weapons' contained in Article 23 (a) of the Hague Regulations was illegal in so far as it exposed combatants to unnecessary suffering: see Winfield in Lawrence, § 205.

the use of explosive projectiles in war. The representatives of seventeen Powers signed, on December 11, 1868, the so-called Declaration of St. Petersburg,<sup>1</sup> which stipulates that the signatory Powers, and those who should accede later, renounce in case of war between themselves the employment, by their military and naval forces, of any projectile of a weight below 400 grammes (14 ounces) which is either explosive or charged with fulminating or inflammable substances.<sup>2</sup>

§ 112. As Great Britain had introduced bullets manufactured at the Indian arsenal of Dum-Dum, near Calcutta, the hard jacket of which did not quite cover the core, and which therefore easily expanded and flattened in the human body, the First Hague Conference adopted a declaration, signed on July 29, 1899, by fifteen Powers, stipulating that they should abstain, in case of war between two or more of them, from the use of bullets which expand or flatten easily in the human body, such as bullets with hard envelopes which do not entirely cover the core, or are pierced with incisions.<sup>3</sup>

Expanding (Dum-Dum) Bullets.

§ 113. The First Hague Conference also adopted a Declaration signed, on July 29, 1899, by sixteen States, stipulating that the signatory Powers should, in a war between two or more of them, abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.<sup>4</sup> The Declaration gave expression, in this particular sphere, to the customary rules, prohibiting the use of poison<sup>5</sup> and of material causing unnecessary suffering. Both these rules were formally enacted in Articles 23 (a) and 23 (e) of

Projectiles diffusing Asphyxiating or Deleterious Gases.

<sup>1</sup> See above, vol. i. § 562, and Martens, *N.R.G.*, xviii. p. 474.

<sup>2</sup> On the use of explosive or incendiary small-arm ammunition in air warfare see below, § 214d.

<sup>3</sup> During the World War the belligerents charged one another with using these bullets. See details in Garner, i. § 177, who considers that (§ 178) 'the evidence at hand . . . does not indicate that any general use of this [type of bullet] was authorized by any belligerent, or that it was in fact used except perhaps in occasional instances.' During the Italo-

Abyssinian War in 1935 and 1936 Italy protested to the League of Nations on account of the alleged use of dum-dum bullets by Abyssinia: Doc. C. 242. M. 140. 1936. VII. and *Off. J.*, 1936, pp. 581-604.

<sup>4</sup> During the World War, however, Germany introduced such shells, and her adversaries also used them by way of reprisals. See details in Garner, i. § 188.

<sup>5</sup> Spaight, *Air*, p. 161, describes it as 'one of the oldest and most generally admitted rules of warfare.'

the Hague Regulations. Since then there has been a series of attempts, some of which have become effective as legally binding prohibitions, to abolish the use of gas and chemical methods of warfare. In Article 171 of the Treaty of Versailles the parties recognised that 'the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices' was prohibited, and laid down that 'their manufacture and importation are strictly forbidden in Germany.' This provision also appeared in other peace treaties of 1919 and in the Treaty of Berlin between the United States and Germany of August 25, 1921.<sup>1</sup> In Article 5 of the Treaty of Washington of February 1922, for the protection of the lives of neutrals and non-combatants at sea in time of war and the prevention of the use of noxious gases and chemicals, the parties declared their assent to the prohibition of 'the use in war of asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices.'<sup>2</sup> The Treaty referred to its declaratory character in view of the fact that the methods prohibited by it 'had been justly condemned by the civilised world' and the prohibition of their use had been adopted 'in treaties to which a majority of the civilized States are parties.' This Treaty has not entered into force on account, it appears, of doubts connected with the provisions relating to submarine warfare.<sup>3</sup> In June 1925, in connection with the Conference for the supervision of the international trade in arms and ammunition,<sup>4</sup> a number of States, including the Great Powers, met at a special Conference convened by the Council of the League and signed a Protocol in which, so far as not already parties to treaties prohibiting the use in war of 'asphyxiating, poisonous, or other gases, and of all analogous liquids, materials or devices,' they accepted this prohibition, agreed to extend it to the use of bacteriological methods of warfare, and agreed to be bound as between themselves by the terms of the Protocol. The Protocol has now been ratified by

<sup>1</sup> *A.J.*, xvi. (1922), Suppl., p. 10.

<sup>2</sup> Cmd. 1627 of 1922, and *A.J.*, xvi. (1922), Suppl., pp. 57-60. On the Washington Treaty see Malkin in *B.Y.*, 1922-1923, pp. 179-182; Diena

in *Rivista*, 3rd ser., i. (1921-1922) pp. 472-475.

<sup>3</sup> See below, § 194a.

<sup>4</sup> See above, § 25h.

over forty States, including all the European Great Powers.<sup>1</sup> Finally, it must be noted that Article 39 of the Draft Convention of the Preparatory Commission on Disarmament of 1930<sup>2</sup> affirmed the prohibition of gas warfare, and that the prohibition of gas, bacteriological and incendiary warfare formed part of the resolution of the General Commission in 1932.<sup>3</sup>

These drafts and pronouncements, which have not, so far, all acquired the force of law, bear witness to the tendency to universality in the prohibition of chemical warfare. But the cumulative effect of customary law and of the existing instruments having binding force, such as the Hague Declaration, the Hague Regulations, Article 171 of the Treaty of Versailles, and other Peace Treaties of 1919, the corresponding provisions of the Treaty of Berlin, and of the Protocol of 1925, is probably to render such prohibition legally effective upon practically all States. And the cruelty and incalculable measure of suffering and injury to combatants and non-combatants alike inherent in this weapon are such as to suggest the criminality of its indiscriminate use in the form of reprisals unless as a measure of retaliation in kind.<sup>4</sup>

<sup>1</sup> The British ratification was deposited in April 1930: see Treaty Series, No. 24 (1930), Cmd. 3604. For the text see also *L.N.T.S.*, 94, p. 65; Hudson, *International Legislation*, 3, p. 1670; League Doc. A. 13. 1925. IX. (together with the reports of the Conference). See also A. 16. 1924. IX. Great Britain and France (and a number of other States) signed subject to the reservation (a) that it is binding only in relation to States effectively bound by it, and (b) that it shall cease to be binding if the enemy or his allies fail to respect the prohibitions laid down therein. See above, § 69a. The prohibitions of the Protocol are incorporated in Articles 51 and 52 of the Italian War Regulations of 1938, where their observance is made dependent either upon treaties or upon actual reciprocity. On the outbreak of the war in September 1939, Germany, in answer to the British inquiry, made it to be known that she would observe the prohibition

of the Protocol of 1925 subject to reciprocity. See Sir N. Henderson's Final Report of September 20, 1939: Cmd. 6115, p. 25.

<sup>2</sup> See above, § 25i.

<sup>3</sup> See *Documents*, 1932, p. 180. In May 1938 the Council of the League, following upon communications received from the Chinese Government, adopted a resolution recalling that the use of toxic gases as a method of war is condemned by International Law and requested the Governments of States which might be in a position to do so to supply the League with information on the subject: *Off. J.*, 1938, p. 378. A similar resolution was adopted in November 1938: *ibid.*, p. 881.

<sup>4</sup> The Final Report of the Preparatory Commission on Disarmament in 1930 goes further than the suggestion in the text inasmuch as it excludes the use of this weapon as a measure of reprisals even against such States as have themselves resorted to it:

Violence  
directed  
from Air  
Vessels.

§ 114. The First Hague Conference had adopted likewise a Declaration, signed on July 29, 1899, prohibiting for a term of five years the launching of projectiles or explosives from balloons or other kinds of aerial vessels. The Second Hague Conference, on October 18, 1907, had renewed this Declaration up to the close of the Third Hague Conference; but out of twenty-seven States which signed it, only a few (among them Great Britain and the United States of America) had ratified it before the World War, and Ger-

League Doc. C. 590. M. 289. 1930. IX. § 221. But see the communication of the Italian Government of April 30, 1936, to the Chairman of the League Committee of Thirteen in which, while expressing the intention of Italy to abide by the provisions of the Protocol of 1925, the Italian Government refused to admit that the Protocol precluded the exercise of the right of reprisal in punishment for gross violations of the laws of war: *Off. J.*, 1936, p. 580. It must be regarded as an established fact that Italy resorted to the use of poison gas. For the various documents and discussions on this question before the Council of the League see *Off. J.*, 1936, April, May, and June.

As to the possibility of discriminating between various kinds of gases see the British Memorandum on chemical warfare presented in November 1930 to the Preparatory Commission for the Disarmament Conference: Misc. No. 17 (1930), Cmd. 3747. The Memorandum explains that according to the British interpretation the prohibition of the use of 'asphyxiating, poisonous, or similar gases' covers lachrymatory gas. It is true that some gases are not so deadly or so cruel as others, but the dangers of recognising any categories of permitted gases and thus sanctioning the manufacture of the necessary equipment for using them are obvious and great, so that, it is submitted, the society of States has adopted the right policy in endeavouring to extirpate this mode of warfare *in toto*.

The view is widely held that, having regard to the ease with which the various peace-time industries can be

turned to the production on a large scale of material for use in gas and, generally, chemical warfare, the most practical, if not the only, approach to the problem is on the lines of a substantial measure of internationalisation and international supervision of the industries in question. See in particular Lefebure and Van Eysinga, cited below.

See on the whole question Hyde, ii. § 662; Winfield in Lawrence, § 205; Fauchille, §§ 1082, 1440 (21); Spaight, *Air*, pp. 161-166, and *Air Power and Cities* (1930), pp. 162-176; Haber, *Zur Geschichte des Gaskrieges* (1924); Haldane, *Callinicus, a Defence of Chemical Warfare* (1925); Baker, *Disarmament* (1926), pp. 274-289; Kunz, *Gaskrieg und Völkerrecht* (1927), and in *Z.d.R.*, vi. (1926) pp. 73-106; *Commission internationale d'experts pour la protection des populations civiles contre la guerre chimique*, 2 vols. (1928, 1929); Bloch, *La guerre chimique* (1929); Fradkin, *Chemical War: Its Possibilities and Probabilities* (International Conciliation Pamphlet No. 248, 1929), and the same, *The Air Menace* (1934), pp. 4-92; Pfuhl, *Gaskrieg und Völkerrecht* (1930); Lefebure, *Scientific Disarmament* (1931), pp. 185-264, and in *Grotius Society*, vii. (1922) pp. 153-166; Hanslian, *Der chemische Krieg* (3rd ed., 1937); Overweg, *Die chemische Waffe und das Völkerrecht* (1937); Manisty in *Grotius Society*, ix. (1924) pp. 17-28; Van Eysinga in *Hague Recueil*, 1927 (i.), pp. 329-381; Korovine in *R.G.*, xxxvi. (1929) pp. 646-668; Mills in *Foreign Affairs*, x. (1931-1932) pp. 444-452; Kroell in *Revue générale de droit aérien*, iii. (1934) pp. 546-558.

many, France, Italy, Japan, Russia—not to mention smaller Powers—did not even sign it. When the World War broke out, not one of the Central Powers had ratified the Declaration; its provisions were not binding, and were not observed.<sup>1</sup>

§ 115. It will be remembered <sup>2</sup> that numerous individuals belong to armed forces without being combatants. Now, since and in so far as these non-combatant members of armed forces do not take part in the fighting, they may not be directly attacked and killed or wounded. However, they are exposed to all injuries indirectly resulting from the operations of warfare. And, with the exception of the personnel <sup>3</sup> engaged in the interest of the wounded, such as doctors, chaplains, persons employed in military hospitals, official ambulance men, who, according to Articles 9 and 10 of the Geneva Convention, are specially privileged, such non-combatant members of armed forces may certainly be made prisoners, since the assistance they give to the fighting forces may be of great importance.

Violence  
against  
Non-Com-  
batant  
Members  
of Armed  
Forces.

§ 116. Whereas in former <sup>4</sup> times private enemy persons of either sex could be killed or otherwise badly treated according to discretion, and whereas in especial the inhabitants of fortified places taken by assault used to be abandoned to the mercy of the assailants, in the eighteenth century it became a universally recognised customary rule of the Law of Nations that private enemy individuals should not be killed or attacked. In so far as they do not take part in the fighting, they may not be directly attacked and killed or wounded. They are, however, like non-combatant members of the armed forces, exposed to all injuries indirectly resulting from the operations of warfare. Thus, for instance, when a defended town is bombarded, and thousands of inhabitants are thereby killed, or when a train carrying private individuals as well as soldiers is wrecked by a mine, no violation of the rule prohibiting attack on private enemy persons has taken place.

Violence  
against  
Private  
Enemy  
Persons.

As regards captivity, the rule is that private enemy

<sup>1</sup> See below, § 214a.

<sup>2</sup> See above, § 79.

<sup>3</sup> See below, § 121.

<sup>4</sup> See Grotius, iii. c. 4, §§ 6, 9.

persons may not be made prisoners of war.<sup>1</sup> But this rule has exceptions conditioned by the carrying out of certain military operations, the safety of the armed forces, and the order and tranquillity of occupied enemy territory. Thus, for instance, influential enemy citizens who try to incite their fellow-citizens to take up arms may be arrested and deported into captivity. And even the whole population of a province may be imprisoned in case a levy *en masse* is threatening.<sup>2</sup>

But if a levy *en masse* is not threatening, an occupant has no right to take into captivity<sup>3</sup> private enemy individuals of military age, although, of course, he can resort to measures of restraint to prevent them from escaping and joining the forces of the enemy, and can punish them if they attempt to do so.

Apart from captivity, restrictions of all sorts may be imposed upon, and means of force may be applied against, private enemy persons for many purposes: such as keeping order and tranquillity on occupied enemy territory; prevention of any hostile conduct, especially conspiracies; prevention of intercourse with, and assistance to, the enemy forces; securing the fulfilment of commands and requests of the military authorities, such as those for the provision of drivers, hostages, farriers; securing compliance with requisitions and contributions, and securing the execution of public works necessary for military operations, such as the building of soldiers' quarters, roads, bridges, and the like; provided the requisitioned services do not form part of the military operations.<sup>4</sup>

<sup>1</sup> This statement refers only to the treatment of private enemy individuals by an invader, and has no reference to enemy subjects found by a belligerent on his own territory at the outbreak of war. See above, § 100, and below, § 170.

<sup>2</sup> Civilians who render assistance to the enemy as drivers, or as labourers to construct fortifications or siege works, or in a similar way, if captured while they are so engaged, may not be detained as prisoners of war, whether they render these services voluntarily or are requisitioned or hired. See *Land Warfare*, § 58 n. (a).

<sup>3</sup> When in 1914, during the World War, the Germans took into captivity all men of military age in Belgium and the occupied part of France, Great Britain and France resorted to reprisals. See below, § 413a, and Wehberg, p. 315.

<sup>4</sup> Can private enemy persons be compelled to build fortifications, construct trenches, and the like? The matter is not settled in practice. See below, § 170. See also Holland, *War*, No. 77; Spaight, *Land*, p. 151; Ferrand, *Des réquisitions en matière de droit international public* (1917), p. 60; Garner in *A.J.*, xi. (1917) p. 111; Rolin, § 362.

What kinds of violent means may be applied for these purposes is in the discretion of the military authorities, who will act according to expediency, and the rules of martial law established by the belligerents. But there is no doubt that, if necessary, capital punishment and imprisonment<sup>1</sup> are lawful means for these purposes. The limits within which violence may be applied to private individuals in modern warfare find expression in Article 46 of the Hague Regulations: 'family honour and rights, individual lives and private property, as well as religious convictions and liberty, must be respected.'

§ 117. The head of the enemy State and officials in important posts, in case they do not belong to the armed forces, occupy, so far as their liability to direct attack, death, or wounds is concerned, a position similar to that of private enemy persons. But they are so important to the enemy States, and they may be so useful to the enemy and so dangerous to the invading forces, that they may certainly be made prisoners of war. If a belligerent succeeds in obtaining possession of the head of the enemy State or its cabinet ministers, he will, save in exceptional circumstances,<sup>2</sup> certainly remove them into captivity. And he may do the same with diplomatic agents and other officials of importance, because, by weakening the enemy Government, he may thereby influence the enemy to agree to terms of peace.

Violence  
against  
the Head  
of the  
Enemy  
State and  
against  
Officials  
in Im-  
portant  
Positions.

### III

#### TREATMENT OF WOUNDED AND OF DEAD BODIES

Hall, § 130—Westlake, ii. pp. 72-76—Lawrence, § 165—Maine, pp. 156-159—Manning, p. 205—Phillimore, iii. § 95—Halleck, ii. pp. 36-39—Moore, vii. § 1134—Taylor, §§ 527-528—Hershey, Nos. 369-374—Bluntschli, §§ 586-592—Lueder in *Holtzendorff*, iv. pp. 289-318, 398-421—Liszt, § 60, ii.—Ullmann, § 178, and in *R.G.*, iv. (1897) pp. 437-445—Fauchille, §§ 1108-

<sup>1</sup> That, in case of general devastation, the peaceful population may be detained in so-called concentration camps there is no doubt; see below, § 154. And there is likewise no doubt that hostages may be taken from the peaceful population; see below,

§§ 170, 259.

<sup>2</sup> Thus when Germany invaded Denmark in April 1940 she allowed and facilitated the departure from that country of the staffs of the British, French, and Polish legations and consulates and of their families.



1118 (10)—Despagnet, Nos. 551-554—Pradier-Fodéré, vi. No. 2794, vii. Nos. 2849-2881—Rivier, ii. pp. 268-273—Nys, iii. pp. 499-510—Calvo, iv. §§ 2161-2165—Fiore, iii. Nos. 1365-1372, and *Code*, Nos. 1594-1609—Martens, ii. § 114—Longuet, §§ 85-90, 92-93—Mérignhac, iii<sup>a</sup>. pp. 186-240—Pillet, pp. 165-192—Suarez, §§ 377, 378—Mérignhac-Lémonon, i. pp. 326-351—Hyde, ii. §§ 680-687—Keith's *Wheaton*, pp. 733-745—*Kriegsbrauch*, p. 25—*Land Warfare*, §§ 174-220—Zorn, p. 122—Bordwell, pp. 249-277—Spaight, *Land*, pp. 419-460—Higgins, pp. 35-38—Balladore Pallieri, pp. 219-239—Holland, *Studies*, pp. 61-65—Holland, *War*, Nos. 41-69—Garner, i. §§ 313-318—Gurlt, *Zur Geschichte der internationalen und freiwilligen Krankenpflege* (1873)—Lueder, *Die Genfer Konvention* (1876)—Moynier, *La Croix-Rouge, son passé et son avenir* (1882); *La revision de la Convention de Genève* (1898); *La fondation de la Croix-Rouge* (1903)—Buzzatti, *De l'emploi abusif... de la Croix-Rouge* (1890)—Trieppel, *Die neuesten Fortschritte auf dem Gebiet des Kriegsrechts* (1894), pp. 1-41—Müller, *Entstehungsgeschichte des rothen Kreuzes und der Genfer Konvention* (1897)—Münzcll, *Untersuchungen über die Genfer Konvention* (1901)—Gillot, *La révision de la Convention de Genève, etc.* (1902)—Meurer, *Die Genfer Konvention und ihre Reform* (1906)—Schneider, *Die Genfer Konvention* (1911)—Deslandes-Grandpré, *La Convention de Genève et ses réformes successives* (1938)—Gareis in *Strupp*, *Wört.*, i. pp. 377-383—Borel in *Hague Recueil*, 1923 (i.), pp. 573-604—Des Gouttes, *Commentaire de la Convention de Genève de 27 juillet, 1929* (1930)—Roszkowski in *R.I.*, 2nd ser., iv. (1902) pp. 199, 299, 442—Delpech in *R.G.*, xiii. (1906) pp. 629-724—Macpherson in *Z.V.*, v. (1911) pp. 253-277—Voncken in *R.I. (Paris)*, 21 (1938), pp. 357-372. And see *Actes de la Conférence de 1929* (edited by Des Gouttes, 1930), and *Recueil des textes relatifs à l'application de la Convention de Genève* (published by the International Red Cross Society, 1934).

Origin of  
Geneva  
Conven-  
tion.

§ 118. Although,<sup>1</sup> since the seventeenth century, several hundred special treaties have been concluded between different States regarding the tending of each other's wounded and the exemption of army surgeons from captivity, no general rule of the Law of Nations on these points was in existence until the second half of the nineteenth century, other than one prohibiting the killing, mutilation, or ill treatment of the wounded. A change for the better was initiated by Jean Henry Dunant, a Swiss citizen from Geneva, who was an eyewitness of the battle of Solferino in 1859, where many thousands of wounded died who could, under more favourable circumstances, have been saved. When he published, in 1861 and 1863, his pamphlet, *Un souvenir de Solferino*, the Geneva Société d'Utilité Publique, under the Presidency of Gustave Moynier, created an agitation in favour of better arrangements

<sup>1</sup> See Macpherson, *op. cit.*, p. 254.

for tending the wounded on the battlefield, and convoked an International Congress at Geneva in 1863, where thirty-six representatives of nearly all the European States met and discussed the matter. In 1864 the Bundesrath, the Government of the Federal State of Switzerland, took the matter in hand officially, and invited all European, and several American, States to send official representatives to a Congress at Geneva for the purpose of discussing and concluding an international treaty regarding the wounded. This Congress met in 1864, and twelve States were represented. Its result was the Convention<sup>1</sup> for the Amelioration of the Condition of Soldiers wounded in Armies in the Field (commonly called 'Geneva Convention'), signed on August 22, 1864. By and by States other than the original signatories joined the Convention, and finally all the civilised States of the world, with the exception of Costa Rica, Monaco, and Lichtenstein, became parties. That its rules were in no wise perfect, and needed to be supplemented regarding many points, soon became apparent. The First Hague Conference in 1899 unanimously formulated the wish that Switzerland should shortly take steps for the meeting of another International Congress to revise the Geneva Convention. This Congress assembled in June 1906, and on July 6, 1906, a new Geneva Convention<sup>2</sup> was signed by the representatives of thirty-five States, including all the Great Powers. No less than twenty-eight of these States ratified the Convention, and at least eleven others have acceded.

When the World War broke out, almost all the belligerents were parties to the Convention, but not quite all; and it was provided by Article 24 that it ceases to be binding in any war from the moment when a State which is not a party to it becomes a belligerent. However, all the belligerents were parties to the old Convention of 1864, which remained in force between those Powers which were parties to it without being parties to the Convention of 1906.<sup>3</sup>

<sup>1</sup> See Martens, *N.R.G.*, xviii. p. 607, and above, vol. i. § 560.

<sup>2</sup> See Martens, *N.R.G.*, 3rd ser., i. p. 620, and Treaty Series (1907), No. 15.

<sup>3</sup> Except that Costa Rica, who became a belligerent on May 24, 1918, was not a party to the Convention of 1864. She acceded to the Convention of 1906 in 1910.

None the less, the provisions of both Conventions were often violated during the war.<sup>1</sup> The experience of the World War revealed the necessity of supplementing the Convention of 1906. On July 1, 1929, representatives of forty-seven States met at Geneva at a conference (the second object of which was to frame a Convention on the Treatment of Prisoners of War<sup>2</sup>), and on July 29 thirty-three of them signed a Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. The other fourteen States signed later on. As between the ratifying or adhering signatories the Convention of 1929 replaces those of 1864 and 1906.<sup>3</sup> The main rules of the Convention of 1929 are as follows :

The  
Wounded,  
the Sick,  
and the  
Dead.

§ 119. According to Articles 1-5, sick or wounded persons officially attached to armies must be respected, protected, and cared for, without distinction of nationality, by the belligerent in whose power they may be. Should, however, a belligerent be compelled to abandon them to the enemy, he must, so far as military exigencies permit, leave behind with them a portion of his medical personnel to assist in taking care of them, together with the necessary material. The sick and wounded who have fallen into the hands of the enemy are prisoners of war, but belligerents may make such arrangements as to their treatment as they may think fit beyond the limits of the existing obligations.<sup>4</sup> After each engagement, the commander in possession of the field must have search made for the wounded and dead, and must take measures to protect them against pillage and maltreatment. It is recommended that a local armistice or suspension of fire be arranged to make possible the removal

<sup>1</sup> See details in Garner, i, §§ 313-318.

<sup>2</sup> See below, § 125.

<sup>3</sup> Treaty Series, No. 36 (1931), Cmd. 3793. And see No. 37 (1931), Cmd. 3795, for the Final Act of the Conference containing a number of recommendations.

<sup>4</sup> Articles 68 and 69 of the Convention of 1929 on the Treatment of Prisoners of War (see below, § 125) have now imposed upon the belligerents the duty to send back to

their own country prisoners of war who are seriously ill or seriously wounded. The forms of disablement or sickness requiring direct repatriation, and cases necessitating accommodation in a neutral country, are to be determined by agreement. Permanent mixed medical commissions containing a neutral member and deciding by majority are to examine the sick or wounded prisoners and make the appropriate decisions with regard to them.

of the wounded remaining between the lines. Article 5 stipulates that the military authority may appeal to the charitable zeal of the inhabitants to collect and take care of the wounded and sick of the armies under his direction, granting to those who have responded to his appeal special protection and certain facilities.

§ 120. In order that the wounded and sick may receive proper treatment, mobile medical units and fixed <sup>1</sup> establishments of the medical service must be respected and protected by the belligerents; but this protection ceases if they are made use of to commit acts harmful to the enemy, such as sheltering combatants, carrying on espionage, and concealing arms and ammunition (Articles 6 and 7).<sup>2</sup>

Medical  
Units and  
Establish-  
ments,  
and  
Material.

As regards *material*, a distinction is drawn between material of mobile medical units, of fixed medical establishments, and of voluntary aid societies.

(a) Mobile medical units which fall into the hands of the enemy must not be deprived of their material, including their teams, whatever may be the means of transport and whoever may be the drivers employed (Article 14). The competent military authority is, however, permitted to make use of the material in captured medical units for the treatment of the wounded and the sick at hand, but it must be restored under the same conditions, and so far as possible at the same time, as the medical personnel.<sup>3</sup>

(b) The buildings and material of fixed medical establishments of the army<sup>4</sup> which, because the locality where they are is militarily occupied, fall into the hands of the enemy,

<sup>1</sup> See Köllreuter in *Z.V.*, x. (1918) p. 499, on the case of buildings (e.g. railway stations) which are of military importance and yet may be lawfully flying the Red Cross flag because they are temporarily sheltering wounded persons collected there. On the bombing of hospitals see Spaight, *Air*, pp. 260-265.

<sup>2</sup> But Article 8 expressly enacts that the units and establishments do not forgo protection: (a) because the personnel are armed, and use their arms for their own defence, or for the defence of the wounded and sick; (b) because, in the absence

of armed orderlies, units or establishments are guarded by a picket or by sentries; (c) because small arms and ammunition, taken from the wounded and not yet handed over to the proper department, are found there; (d) because of the presence of the personnel and material of the veterinary service, which does not form part of the sanitary formation or establishment.

<sup>3</sup> See below, § 121.

<sup>4</sup> The property of charitable establishments not belonging to the army is governed by Article 56 of Hague Convention No. IV. See below, § 138.

remain, according to Article 15, 'subject to the laws of war.' That means that they remain entirely in the power of the captor. But they may not be diverted from their medical purpose so long as they are required for the wounded and sick. Should, however, urgent military necessity demand it, a commander may dispose of them, provided he makes previous arrangements for the welfare of the wounded and sick found in them.

(c) The material of voluntary aid societies, which are duly recognised, is, according to Article 16, considered private property, and must, therefore, be respected as such under all circumstances. It may be requisitioned only in case of urgent necessity, and only after provision has been made for the welfare of the wounded and sick.

**Personnel.** § 121. The personnel engaged exclusively in the collection, transport, and treatment of the wounded and sick, and also in the administration of mobile medical units and establishments, and the chaplains attached to armies, must, according to Article 9, under all circumstances<sup>1</sup> be respected and protected.<sup>2</sup> If they fall into the hands of the enemy, they must not be treated as prisoners of war. Soldiers specially trained for employment, in case of necessity, as auxiliary nurses or stretcher-bearers, and furnished with a proof of identity, must be treated in the same way as the permanent medical personnel if captured while carrying out these functions. According to Article 12 they must not be retained. In the absence of an agreement to the contrary, they must be returned to the opponent as soon as the route for their return is open and military considerations permit. In the meantime they are to continue to carry on their duties under the direction of the captor, preferably in order to take care of the wounded and the sick of their own army. On their departure they must be allowed to take with them

<sup>1</sup> Does this article prevent the punishment of such persons by the enemy for so-called war-crimes? Strupp in *Z.I.*, xxv. (1915) p. 357, says 'No'; but there is no reason to accept this answer as correct. See Maschka in *Z.V.*, xi. (1918) pp. 76-83.

<sup>2</sup> It was held by the United States Circuit Court of Appeals that a

person who had joined the German army as a Red Cross surgeon had not become an enemy, as, under the Geneva Convention of 1906, Red Cross surgeons could not be regarded as forming part of the 'military forces proper': *Vowinkel v. First Federal Trust Co.*, *Annual Digest*, 1925-1926, Case No. 352.

the effects, instruments, arms, and means of transport belonging to them.<sup>1</sup>

The personnel of voluntary aid societies employed in the medical units and establishments is, according to Article 10, privileged to the same extent as the permanent official personnel, provided that the society concerned is duly recognised and authorised by its Government, and its personnel is subject to military law and regulations. Each State must notify to the other, before actually employing them, the names of societies which it has authorised to render assistance to the regular medical service of its armies.<sup>2</sup>

§ 122. Vehicles equipped for the evacuation of the wounded and sick, whether proceeding singly or in convoy, must be treated in the same way as mobile medical units, but subject to the following special provisions of Article 17.

That article lays down that a belligerent intercepting vehicles of medical transport, singly or in convoy, may, if military exigencies demand, stop them, and break up the convoy, provided he takes charge in every case of the wounded and sick who are in it. He may use the vehicles only in the sector where they have been intercepted, and exclusively for medical requirements. These vehicles, as soon as they are no longer required for local use, must be given up in accordance with the conditions laid down in Article 14.<sup>3</sup> The military personnel in charge of the transport, and furnished for this purpose with authority in due form, must be sent back in accordance with the conditions prescribed in Article 12 for medical personnel.<sup>4</sup>

§ 122a. The principal innovation of the Convention of Medical  
Air-  
craft.

<sup>1</sup> So long as they are detained by the enemy he must, according to Article 13, grant them the same food, the same lodging, and the same allowances and pay as are due to personnel holding the same rank in his own army.

<sup>2</sup> A recognised voluntary aid society of a neutral country cannot, according to Article 11, afford the assistance of its personnel and its units to a belligerent unless it has previously received the consent of

its own Government and of the belligerent concerned; and a belligerent who accepts such assistance is bound, before making any use of it, to give notice to the enemy. On neutral assistance within the framework of the Convention see Curtius in *R.G.*, xliii. (1936) pp. 687-704, and Huber in *Revue internationale de la Croix-Rouge*, xviii. (1937) pp. 353-363.

<sup>3</sup> See above, § 120.

<sup>4</sup> As to pilots, mechanics, and wireless operators, see below, § 122a.

1929 lies in the provisions relating to medical aircraft.<sup>1</sup> Article 18 provides that aircraft used<sup>2</sup> as a means of medical transport shall enjoy the protection of the Convention during the period in which they are reserved exclusively for the evacuation of wounded and sick and the transport of medical personnel and material. Medical aircraft must, in order to enjoy the protection of the Convention, be painted white and bear the distinctive emblem of the Convention (see below, § 123), side by side with its national colours, on its lower and upper surfaces. Owing to the increased potentialities on the part of aircraft for collecting intelligence, Article 18 lays down that in the absence of special and express permission it is prohibited to fly over the firing line and generally over the territory belonging to or occupied by the enemy. Medical aircraft must obey the enemy summons to land.<sup>3</sup> In the event of landing, either involuntarily or in compliance with the summons, the wounded and sick, as well as the medical personnel and material, including the aircraft, shall, it is provided, enjoy the privileges of the Convention.<sup>4</sup> In particular, the pilot, mechanics, and wire-

<sup>1</sup> See Des Gouttes and Julliot, *Recueil de Documents sur la neutralisation des aéronefs sanitaires* (2nd ed., 1925); *Compte rendu du premier Congrès international de l'aviation sanitaire* (Paris, 1929); Des Gouttes, *La Convention de Genève de 1929* (1930), pp. 18-41; Julliot, *La Convention de Genève de 1929 et l'immunisation des appareils sanitaires aériens* (1929), in *R.G.*, xxxviii. (1931) pp. 145-214, and in *R.G.D.A.*, 6 (1937), pp. 41-49; Deslandes-Grandpré, *ibid.*, 7 (1938), pp. 21-28; Devillers, *L'aviation sanitaire au point de vue du droit international* (1933); Kroell, *Traité de droit international public aérien*, ii. (1936) pp. 244-268.

<sup>2</sup> It is not necessary that the aircraft should be equipped and built for that purpose. According to the terms of the Convention there would seem to be no objection against converting ordinary military aircraft for the purposes of Article 18; neither would a belligerent be prohibited from using subsequently medical aircraft for other purposes, provided that he removes from them the distinctive

protective signs of the Convention (see below). See also Des Gouttes, *op. cit.*, pp. 122-126. The Convention does not prescribe a maximum height at which medical aircraft is permitted to fly.

<sup>3</sup> Refusal to land exposes such aircraft to attack and, in case of forced landing, to loss of the privileges accorded by the Convention. If the pilot is captured on a subsequent occasion, it is probable that Article 50 of the Convention on Prisoners of War applies by analogy (see below, § 128), and that the pilot is not liable to punishment.

<sup>4</sup> See Article 17. This includes probably the restoration, *inter alia*, of the ordinary medical aircraft itself. The sick and wounded become prisoners of war. This, on analogy with the interception of a convoy in land warfare, is unobjectionable in case of forced descent or of descent due to a summons justified by circumstances, but if there was no good reason for the summons, it is difficult to see why the sick or wounded should be penalised for an error for which their own pilot was not responsible.

less telegraph operators shall be sent back, on condition that they shall be employed until the close of hostilities in the medical service only.<sup>1</sup>

§ 123. According to Article 19, the Swiss heraldic device of the red cross on a white ground,<sup>2</sup> formed by reversing the Federal colours, is adopted as the emblem and distinctive sign of the medical service of the armed forces. At the same time the Convention recognises the emblems of the Red Cross, the Red Crescent, or the Red Lion and Sun on a white ground as a distinctive emblem in such countries as already use these emblems. Thus Turkey has substituted a red crescent and Persia a red sun. The following are the rules concerning the use of this emblem :

(1) It must be shown, with the permission of the competent military authority (Article 20), on the flags, the armlets (*brassards*) and on all the material belonging to the medical service.

(2) Medical units and establishments fly the Red Cross flag, which in the case of fixed establishments must, and in mobile formations may, be accompanied by the national flag of the belligerent to which they belong (Article 22).<sup>3</sup>

(3) All the personnel, according to Article 21, wear, on the left arm, an armlet (*brassard*) with a red cross on a white ground, stamped by the competent military authority. Provision is made for the issue of uniform certificates of

<sup>1</sup> It will be noted that there is no duty to send back the chauffeurs or persons similarly employed in other mobile medical functions. The provisions of Article 18 are due to the fact that in the case of aircraft the persons in question are highly skilled, and that their retention might seriously impede the medical services of the belligerent. A pilot who violates his undertaking to serve in medical units only is, if recaptured, exposed to the same punishment as a prisoner of war who is recaptured after having been released on parole (see below, § 129). However, apart from the obligation of released pilots not to engage in military operations proper, there is, according to the Convention, nothing to prevent pilots from serving alternately in ordinary military

and medical aircraft. In view of this absence of any rigid rule providing for exclusiveness of the two kinds of service in relation to the same person, and also on general grounds, the condition attached to the release of pilots is open to objection.

<sup>2</sup> See below, § 207.

<sup>3</sup> But medical units, belligerent or neutral, while in the hands of the enemy fly only the Red Cross. Neutral medical units rendering assistance in accordance with the Convention fly, along with the Red Cross flag, the national flag of the belligerent to whose army they are attached. They are also entitled to fly their own national flag so long as they render their services to the belligerent (Article 23).



identity for the persons employed as auxiliary nurses or stretcher-bearers and for the personnel of voluntary enemy or neutral societies (see above, § 121).

(4) The red cross on a white ground and the words 'Red Cross' or 'Geneva Cross,' or the other emblems referred to in Article 19, must not, according to Articles 24 and 28, be used,<sup>1</sup> either in peace or war, except to indicate the protected medical units, establishments, personnel, and material.<sup>2</sup>

Treat-  
ment of  
the Dead.

§ 124. According to a customary rule of the Law of Nations, belligerents have the right to demand from one another that dead soldiers shall not be disgracefully treated, and, in particular, that they shall not be mutilated, but shall

<sup>1</sup> For an Italian protest to the League of Nations in 1936 against the alleged misuse by Abyssinia of the emblem of the Convention and other alleged violations of the Geneva Convention see Doc. C. 164. M. 45. 1936. VII. and, in particular, *Off. J.*, 1936, pp. 404-408.

<sup>2</sup> However, the voluntary aid societies (see above, § 121) may, in accordance with their municipal law, use the distinctive emblem in connection with their humanitarian activities in time of peace. Also, by way of exception and with the express permission of one of the national societies of the Red Cross (or the Red Crescent, etc.), use may be made of the emblem of the Convention in time of peace to mark stations exclusively reserved for free treatment of the wounded or sick.

By Article 28, Governments whose representatives signed the Convention, but whose legislation was not then adequate for the purpose, undertook to take, or introduce in their legislatures, the measures necessary to prevent: (a) the employment of the emblem or the name of 'Red Cross' or 'Geneva Cross' by private individuals or by societies other than those entitled to use them, as well as the use, for commercial or other purposes, of any sign or designation constituting an imitation of it; (b) 'by reason of the compliment paid to Switzerland by the adoption of the reversed federal colours,' the use by private individuals or firms of the arms of the Swiss Confederation or marks or trade-marks constituting such an

imitation for a purpose contrary to commercial honesty or in circumstances capable of wounding Swiss national sentiment. Great Britain entered a reservation calculated to exempt from the operation of that Article marks or trade-marks used before the coming into force of the Convention. The Governments had likewise to take, or introduce in their legislatures, in the event of their military law being inadequate, measures necessary for the repression in time of war of any act contrary to the provisions of the Convention (Article 29). Under Section 1 of the Geneva Convention Act, 1911 (1 & 2 Geo. V. c. 20), it is an offence to use the emblem or the words 'Red Cross' or 'Geneva Cross' for purposes of trade or business or for any other purposes whatsoever without the authority of the Army Council. Under Section 1 of the Geneva Convention Act, 1937 (1 Edw. VIII. & 1 Geo. VI. c. 15), it is an offence to use colourable imitations of the emblem or the words without the authority of the Board of Trade. In addition to the medical units of the armed forces, the Army Council have authorised the use of the emblem by the British Red Cross Society, the Order of St. John, and the St. Andrew's Ambulance Association. It was also ruled that municipal ambulances removing civilians injured by an enemy air raid may properly bear the red cross emblem. Subject to certain restrictions, no objections raised to the use of the emblem of toys representing personnel or equipment entitled to bear the emblem.

be, so far as possible, collected and buried <sup>1</sup> or cremated on the battlefield by the victor. Article 3 enacts that, after each engagement, the commander in possession of the field must take measures to ensure protection of the dead against pillage and maltreatment. In view of the tragic phenomenon of the innumerable missing combatants during the World War, the Convention makes, in Article 4, detailed obligatory provisions for reciprocal and speedy communication by the belligerents of the names, together with the indications of identity, not only of the wounded and sick but also of the dead, whether collected after the battle or discovered later on; for the establishment and transmission of certificates of death; for collection and transmission of articles of a personal nature found on the battlefield or on the dead, especially one half of their identity discs, the other half to remain on the body; and for ensuring, before proceeding to cremation or burial, careful examination of the bodies in order to make sure that life is extinct and also in order to establish identity. The belligerents are bound to make provision for honourable interment and for respectful treatment and proper marking of graves so that they may always be found. Graves registration services are to be officially established, and there is to be an exchange of the lists of graves and of dead interred in cemeteries and elsewhere. Pieces of equipment found upon the dead of the enemy are public enemy property, and may, therefore, be appropriated as booty <sup>2</sup> by the victor. The case is different in regard to letters, money, jewellery, and other private property of value found upon the dead on the battlefield, or on the prisoners of war who die in the medical units or fixed establishments.<sup>3</sup>

§ 124a. The Convention of 1929 is conspicuous for its rejection of the idea underlying the so-called general participation clause.<sup>4</sup> Article 25 lays down that if, in time of

Applica-  
tion of  
the Con-  
vention.

<sup>1</sup> See Grotius, ii. c. 19, §§ 1, 3. Regarding a valuable suggestion by Ullmann concerning sanitary measures for the purpose of avoiding epidemics, see above, vol. i. § 590 (n.).

<sup>2</sup> See below, § 139.

<sup>3</sup> See below, §§ 130 and 144.

<sup>4</sup> See above, § 69a. It appears that as Montenegro was not a party to the Convention of 1906, that Convention was not formally binding upon the belligerents in the World War. However, all belligerents in fact regarded the Convention as binding.

war, a belligerent is not a party to the Convention, its provisions shall nevertheless be binding as between all the belligerents who are parties thereto. Moreover, Article 37 of the Convention provides that 'a state of war shall give immediate effect to ratifications deposited and accessions notified by the belligerent Powers *before or after* the outbreak of hostilities.' A further improvement on the previous Convention has been effected by the provisions of Article 38 relating to the denunciation of the Convention. It is laid down in Article 38 that while a party may denounce the Convention, such denunciation to take effect after one year from the date of its notification, it shall not take effect during a war in which the denouncing party is involved. In such a case the Convention continues beyond the period of one year, until the conclusion of peace.<sup>1</sup> Some slight progress has been achieved in regard to the enforcement of the Convention. Article 30 lays down that on the request of a belligerent an inquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention, and that when such violation has been established the belligerents shall put an end to it and repress it as promptly as possible. This provision was adopted after the Conference found itself unable to agree that disputes as to the interpretation and application of the Convention shall be submitted to a binding report by a commission of inquiry or to a judicial decision.<sup>2</sup> However, although the existing provision is vague, it clearly imposes upon the belligerent the duty to agree to an inquiry and to desist from his conduct once its unlawfulness has been ascertained.

<sup>1</sup> To the knowledge of the editor there has so far been no instance of denunciation of any of the Geneva Red Cross Conventions.

<sup>2</sup> For a discussion of the possible enlargement of the scope of this article see Hammar skjöld in *Z.ö.V.*, vii. (1937) pp. 265-294. See also Wehberg in *Hague Recueil*, 48 (1934) (ii.), pp. 59-63. On the part of the

International Red Cross Committee in investigating charges of violation of the Convention and of humanitarian rules of war in general see the letter addressed on April 24, 1936, by the President of the Committee to the Chairman of the League Committee of Thirteen appointed in connection with the Italo-Abyssinian War: *Off. J.*, 1936, p. 578. See also *ibid.*, pp. 364 and 461.

## IV

## CAPTIVITY

Grotius, iii. c. 7 and c. 14—Bynkershoek, *Quaestiones Juris publici*, i. c. 3—Vattel, iii. §§ 148-154—Hall, §§ 131-134—Westlake, ii. pp. 67-72—Lawrence, § 164—Maine, pp. 160-167—Manning, pp. 210-222—Phillimore, iii. § 95—Twiss, ii. § 177—Halleck, ii. pp. 24-38—Taylor, §§ 519-524—Hershey, Nos. 355-368—Moore, vii. §§ 1127-1131—Wharton, iii. §§ 348-348d—Wheaton, § 344—Bluntschli, §§ 593-626—Heffter, §§ 127-129—Lueder in *Holtzendorff*, iv. pp. 423-445—Ullmann, § 177—Fauchille, §§ 1119-1140 (2)—Despagnet, Nos. 544-550—Pradier-Fodéré, vii. Nos. 2796-2842, and viii. No. 3208—Rivier, ii. pp. 273-279—Nys, iii. pp. 511-530—Calvo, iv. §§ 2133-2157—Fiore, iii. Nos. 1355-1362, and *Code*, Nos. 1572-1593—Martens, ii. § 113—Longuet, §§ 77-83—Mérignhac, iii<sup>4</sup>. pp. 156-186—Pillet, pp. 145-164—Hyde, ii. §§ 668-679—Keith's Wheaton, pp. 721-733—Liszt, § 60, i.—Kohler, § 79—Gemma, pp. 327-332—Balladore Pallieri, pp. 202-219—*Kriegsbrauch*, pp. 11-18—Zorn, pp. 73-122—Bordwell, pp. 237-248—*Land Warfare*, §§ 54-116—Spaight, *Land*, pp. 260-319—Spaight, *Air*, pp. 328-348—Holland, *War*, Nos. 24-40, and *Lectures*, pp. 335-344—Garner, ii. §§ 331-360—Eichelmann, *Über die Kriegsgefangenschaft* (1878)—Romberg, *Des belligérants et des prisonniers de guerre* (1894)—Trieppel, *Die neuesten Fortschritte auf dem Gebiet des Kriegsrechts* (1894), pp. 41-55—Holls, *The Peace Conference at The Hague* (1900), pp. 145-151—Cros, *Condition et traitement des prisonniers de guerre* (1900)—Beinhauer, *Die Kriegsgefangenschaft* (1908)—Payrat, *Le prisonnier de guerre dans la guerre continentale* (1910)—Roxburgh, *Prisoners of War Information Bureau* (1915)—Jonas, *Die rechtliche Stellung des Kriegsgefangenen* (1919)—Jaccard, *Capture et captivité des prisonniers en cas de guerre continentale* (1922)—Fooks, *Prisoners of War* (1924)—Wolle, *Reform des Rechts der Kriegsgefangenen* (1929)—Cohen-Salvador, *Les prisonniers de guerre, 1914-1919* (1929)—Schuster, *Zur Reform des Kriegsgefangenenrechts* (1929)—Rasmussen, *Code des prisonniers de guerre* (1931)—Charpentier, *La Convention de Genève du 27 juillet 1929* (1938)—Kirchenheim in *Strupp, Wört.*, i. pp. 713-749—Davis in *A.J.*, vii. (1913) pp. 521-545—G. G. Phillimore and Bellot in *Grotius Society*, v. (1920) pp. 47-64—G. G. Phillimore in *Grotius Society*, vi. (1921) pp. 25-34—*R.G.*, xxviii. (1921) pp. 159-182—Nakayama in *Japanese Review of International Law*, April 1922—Belfield, *Treatment of Prisoners of War*, in *Grotius Society*, ix. (1924) pp. 131-147—Ferrière and Reverdin in *Revue internationale de la Croix-Rouge* (summarised in *Journal of Comparative Legislation*, 3rd ser., iv. (1923) pp. 291-295—Ruzé in *R.G.*, xxxi. (1924) pp. 405-413—Plassmann in *Z.V.*, xiv. (1928) pp. 521-541, and xv. (1930) pp. 410-419—Werner in *Hague Recueil*, 1928 (i.), pp. 5-105—Bosdari in *R.I. (Paris)*, ii. (1928) pp. 833-845—Raabl-Werner in *Preussische Jahrbücher*, 217 (1929), pp. 36-51—Garner in *A.J.*, xxvi. (1932) pp. 807-811—Meitani in *R.I.F.*, vii. (1939) pp. 281-302 and viii. (1939) pp. 26-56, 190-212.

Develop-  
ment of  
Internation-  
al  
Law  
regarding  
Captivity.

§ 125. During antiquity, prisoners of war could be killed, and they were very often at once actually butchered or offered as sacrifices to the gods. If they were spared, they

were as a rule made slaves, and only exceptionally liberated. But belligerents also exchanged their prisoners, or liberated them for ransom. During the first part of the Middle Ages, prisoners of war could likewise be killed or made slaves. Under the influence of Christianity, however, their fate in time became mitigated. Although they were often most cruelly treated during the second part of the Middle Ages, they were not as a rule killed ; and with the disappearance of slavery in Europe they were no longer enslaved. By the time modern International Law gradually came into existence, killing and enslaving prisoners of war had disappeared ; but they were still often treated as criminals, and as objects of personal revenge. They were not considered in the power of the State by whose forces they were captured, but in the power of those forces themselves, or of the individual soldiers that had made the capture ; and it was considered lawful for captors to make as much profit as possible out of their prisoners by way of ransom, if no exchange of prisoners took place. So general was this practice that a more or less definite scale of ransom became usual. Thus, Grotius<sup>1</sup> mentions that in his time the ransom of a private was the amount of his pay for one month. During the seventeenth century, the custom of considering prisoners to be in the power of their captors died out. They were now considered to be in the power of the sovereign by whose forces they were captured. But rules of the Law of Nations regarding their proper treatment were hardly in existence. The practice of liberating prisoners in exchange, or for ransom only, continued. Special cartels were often concluded at the outbreak of, or during, a war, for the purpose of stipulating a scale of ransom according to which either belligerent could redeem his soldiers and officers from captivity. The last<sup>2</sup> instance of such a cartel is that between England and France in 1780, stipulating the ransom for members of the naval and military forces of both belligerents.

It was not until the eighteenth century, with its general tendency to mitigate the cruel practices of warfare, that matters changed for the better. The conviction in time

<sup>1</sup> iii. c. 14, § 9.

<sup>2</sup> See Hall, § 134.

became general that captivity should only be the means of preventing prisoners from returning to their corps and taking up arms again, and should, as a matter of principle, be distinguished from imprisonment as a punishment for crimes. The Treaty of Friendship<sup>1</sup> concluded in 1785 between Prussia and the United States of America was probably the first to stipulate (Article 24) proper treatment for prisoners of war, prohibiting confinement in convict prisons and the use of irons, and insisting upon their confinement in a healthy place, where they may have exercise, and where they may be kept and fed as troops. During the nineteenth century, the principle that prisoners of war should be treated by their captor in a manner analogous to that meted out to his own troops became generally recognised, and the Hague Regulations, by Articles 4 to 20, enacted exhaustive rules regarding captivity: These rules were drawn up in time of peace before the World War; but the experiences of that war disappointed many hopes founded upon them. Moreover, the World War showed that the provisions of the Hague Convention were sadly incomplete. On July 1, 1929, representatives of forty-seven States met at Geneva, at the invitation of the Swiss Government, to consider the revision and the completion of existing rules on (a) the treatment of the sick and wounded in armies in the field; and (b) the treatment of prisoners of war. The Conference, which on both questions was assisted by projects prepared by the International Conference of the Red Cross, evolved two Conventions, both of which were signed on July 29. The first is discussed above, §§ 118-124*a*. The second resulted in a Convention composed of 97 Articles as compared with the 17 Articles of the Hague Convention.<sup>2</sup> The Convention was signed on July 29 by thirty-three of the States participating in the Convention; the other fourteen States represented at the Conference signed later on. Article 89 of the Convention provides that in the relations between States bound by the Hague Conventions of 1899 and 1907 as well as by the Convention of 1929, the latter

<sup>1</sup> See Martens, pt. ii., iv. p. 37.

<sup>2</sup> Treaty Series, No. 37 (1931), Cmd. 3794.

shall be regarded as complementary to Articles 4-20 of the Convention of 1907. In fact, however, the Convention of 1929 incorporates all these articles with the exception of Articles 10-12 relating to release on parole.<sup>1</sup> In view of this it is convenient to use the text of the Convention of 1929 as a basis for the exposition of the existing law on the treatment of prisoners of war.

General  
Provisions  
of the  
Conven-  
tion of  
1929.

§ 126. According to Articles 2-4 of the Convention prisoners of war are in the power of the Government of the captor, and not of the capturing individuals or detachment. The prisoners must at all times be humanely treated<sup>2</sup> and protected, particularly against acts of violence, from insults and public curiosity. Their persons and honour must be respected. They retain their full civil capacity. The captor State must provide for their maintenance. Differences of treatment are permissible only if based on the military rank, the state of health, the professional abilities, or the sex of the prisoner. In general women must be treated with all the consideration due to their sex. Finally—and this is one of the most important innovations of the Convention of 1929—reprisals against prisoners of war are forbidden. The Convention thus, it is to be hoped, puts an end to what the World War has shown to be one of the more discreditable features of warfare.<sup>3</sup>

Capture.

§ 126a. The Convention contains detailed provisions concerning the information which the captor is entitled to ask from the prisoners. Such information is confined to a declaration of the prisoner's true names and rank, or his regimental number. The consequence of the refusal to supply this information is that the prisoner exposes himself

<sup>1</sup> See below, § 129.

<sup>2</sup> For the treatment meted out, during the World War, to British prisoners in the hands of the Germans see 'The Times' *History and Encyclopaedia of the War*, vi. (1916) pp. 241-280; McCarthy, *The Prisoner of War in Germany* (1918); Garner, ii. §§ 331-360; and the following Parl. Papers: Misc. No. 3 (1918), Cmd. 8984; Misc. No. 19 (1918), Cmd. 9106; Misc. No. 27 (1918); Misc. No. 28 (1918); Spaight, *Air*,

pp. 328-348; Mullins, *The Leipzig Trials* (1921). See also Mérignac-Lémonon, i. pp. 255-303, on the treatment of French prisoners; and Plassmann, *Die deutschen Kriegsgefangenen in Frankreich* (1921).

<sup>3</sup> And see below, § 126b, as to so-called 'prophylactic' reprisals. The United States were the first to prohibit, in the Army instructions of 1863, reprisals against prisoners of war.

to a restriction of the privileges accorded to prisoners of his category. No pressure of any kind may be exerted on prisoners to obtain information regarding the situation in their armed forces or their country in general (Article 5).<sup>1</sup> The prisoners are entitled to retain all personal belongings, including metal helmets, gas-masks, identity tokens, badges of rank, decorations, and articles of value, but not including arms, horses, military equipment, and military papers, which are booty.<sup>2</sup> Their money may be taken away from them only on the authority of an officer. A receipt is to be given for it, and the sum impounded must be placed to the account of each prisoner.<sup>3</sup> After capture the prisoners of war must be evacuated from the fighting zone as soon as possible by stages of not more than twenty kilometres per day unless shortage of food and water necessitates longer stages. An exception may be made for the case of prisoners who, by reason of their wounds or maladies, cannot immediately be evacuated (Article 7). Belligerents are required to communicate as soon as possible to each other through the information bureaux (see below, § 130) all captures of prisoners as well as the official addresses to which letters may be addressed to the prisoners of war. The latter must be enabled, as soon as possible, to correspond with their families in the manner provided by the Convention (see below, § 126b). These provisions must be applied also to prisoners captured at sea as soon as possible after arrival in port (Article 8 ; and see below, § 127).

§ 126b. According to Article 9, prisoners of war may be Treatment in  
Camps.

<sup>1</sup> It follows from the clear terms of the Convention that they must not be compelled to give information regarding their age. Such information might enable the belligerent to draw conclusions as to the average of the opposing units and as to the state of the reserves of the enemy.

<sup>2</sup> See below, § 144. In practice (see *Land Warfare*, § 69) such personal belongings are understood to include military uniform, clothing and kit required for personal use, although technically they are Government property. Charges were made that the Germans during the World

War often deprived prisoners of their overcoats : see Garner, ii. § 342.

<sup>3</sup> According to Article 24 the belligerents shall agree on the maximum amount of cash which the prisoners shall be permitted to retain in their possession. The balance, and any deposit of money effected by them, must be carried to their account. The credit balances must be paid to them at the end of their captivity. Facilities must be accorded to them, during captivity, to transfer their credit balances, wholly or in part, to banks or private individuals in their country of origin.



interned in a town, fortress, fenced camp, or other place. They may be required not to go beyond fixed limits. They must not be confined or imprisoned except as a measure indispensable for safety or health, and they must be removed from districts which are unhealthy or the climate of which is too severe for prisoners coming from temperate climates. As far as possible prisoners of different races or nationalities must not be placed in the same camp. The deplorable innovation, introduced during the World War, of so-called prophylactic reprisals<sup>1</sup> is responsible for the provision laying down that 'no prisoner may be sent to an area where he would be exposed to the fire of the fighting zone, or be employed to render by his presence certain points or areas immune from bombardment' (Article 9). Articles 4-17 contain detailed provisions as to the installation of the prisoners' lodgings, which must be hygienic, free from damp, adequately heated and lighted, and provided with proper dormitories the conditions of which must be the same as for the depot troops of the captor. The same applies to the food of the prisoners, who must also be supplied with adequate clothing, underwear, and footwear. The smoking of tobacco is to be authorised. Collective disciplinary measures affecting food are forbidden. Canteens shall be established and their profits utilised for the benefit of the prisoners. Provision must be made for maintaining the camps in a condition of cleanliness and salubrity from the point of view of sanitary and bathing arrangements, physical exercise, the treatment of the sick, and prevention and detection of disease.<sup>2</sup> Facilities must be given for the free performance of religious duties, including attendance at services subject to the routine and police regulations prescribed by the military authorities. Articles 18-20 deal with the internal discipline of camps, which must be placed under the authority of a responsible officer, the saluting of officers of the captor, the wearing of badges, and the language of announcements and orders communicated to the prisoners of war. Article 21 provides that at the

<sup>1</sup> See Spaight, *Air*, pp. 333-340.

food, and clothing provided for prisoners of war during the World War see Garner, ii. §§ 336-347.

<sup>2</sup> For details as to the quarters,

beginning of the war the belligerents shall inform each other of the titles and ranks used in their armed forces in order to ensure equality of treatment between the corresponding ranks of officers and persons of equivalent status. Both must be treated with due regard to their rank and age; they may procure their food and clothing from the pay which they receive from the detaining Power and which must be the same as that of officers of corresponding rank in the armed forces of that Power,<sup>1</sup> provided that it does not exceed the pay to which they are entitled in the armed forces of their own country. Articles 35-41 lay down provisions in the matter of correspondence and postal parcels. It is provided that the belligerents shall fix periodically the number of letters and post-cards which prisoners of war of different categories shall be permitted to send per month. Such correspondence must be sent by post by the shortest route; it must not be delayed or withheld for disciplinary reasons.<sup>2</sup> Prisoners of war are permitted to receive individually postal parcels containing foodstuffs and other articles intended for consumption or clothing. The correspondence or postal parcels sent to or by the prisoners of war are exempt from all postal charges in the countries of origin and destination and in the countries through which they pass. Presents and relief in kind sent to them are exempt from all import and other duties as well as from charges for carriage on railways operated by the State. In cases of urgency they may be authorised to send telegrams on payment of the usual charges. Facilities

<sup>1</sup> This was also provided in the corresponding Article 17 of the Hague Regulations. During the World War the British Government was prepared to carry out this stipulation of this article, but the German Government refused. See *'The Times' History and Encyclopaedia of the War*, vi. p. 263. See also Garner, ii. § 335.

<sup>2</sup> According to Article 40 the captor may prohibit correspondence for military or political reasons. However, such prohibition must be of a temporary character and must be for as brief a time as possible. Equally the censoring of correspondence must be accomplished as soon as possible.

The examination of postal parcels must be effected under such conditions as will ensure the preservation of foodstuffs which they may contain. According to Article 39, prisoners must be permitted to receive individually consignments of books. Such consignments are subject to censorship. But if works or collections of books are sent to the camp libraries by the representatives of the protecting Powers or of duly authorised relief societies, the transmission of such consignments must not be delayed under pretext of difficulties of censorship.

must be accorded for the transmission of documents like powers of attorney and wills, and if necessary, steps must be taken for the legalisation of the signatures of prisoners.<sup>1</sup> Articles 27-34 contain provisions concerning the work of prisoners of war. The captor may employ them as workmen according to their rank and ability if they are physically fit and if they are neither officers nor persons of equivalent status.<sup>2</sup> Prisoners of war may be employed by private individuals, but the captor must assume entire responsibility for their maintenance, care, treatment, and the payment of wages. They must not be employed on work for which they are physically unsuited, nor must they be employed on dangerous or unhealthy work. No disciplinary punishment is permitted in order to make work more arduous. The hours of work must not be excessive; in no case may they be in excess of those permitted for civil workers of the locality employed on the same work. As to prohibited work Article 31 lays down as follows: 'Work done by prisoners of war shall have no direct connexion with the operations of the war. In particular it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for the combatant units.' These prohibitions are more precise than those embodied in the Hague Convention, but, perhaps unavoidably, they are not altogether free of ambiguity.<sup>3</sup> With the exception of work done in connection

<sup>1</sup> In case of death of a prisoner of war, his will must be received and drawn up, and death certified, under the same conditions as for soldiers of the armed forces of the captor. Provision must be made for honourable burial, and for identification and proper treatment of graves (Article 76).

<sup>2</sup> However, so far as possible the captor is bound to find work for them if they so desire. Non-commissioned officers must not be compelled to undertake work other than of a supervisory character.

<sup>3</sup> The term 'direct connexion' is not limited to work done in the fighting zone. For according to other provisions of the Convention—Articles 7 and 9—prisoners ought, as a rule

to be placed outside the fighting zone. But does it cover the digging of trenches and building of fortifications in places removed from the military operations? It will also be noted that Article 31 probably does not exclude the manufacture of war material other than arms and munitions, provided again that it has no direct connection with military operations. The question whether prisoners of war can be compelled to construct fortifications and the like is just as much controverted as the question whether enemy civilians can be forced to do such work. See above, § 116 (n.), and below, § 170. See also Holland, *War*, No. 26; Pillet, p. 155; Spaight, *Land*, p. 212; *Heynen's* case, decided by the German

with the administration and maintenance of the camps, prisoners are entitled to a rate of pay fixed by agreements between the belligerents. The Convention lays down general rules for fixing the pay pending the conclusion of such agreements.<sup>1</sup>

§ 127. Every individual who is deprived of his liberty, not for a crime, but for military reasons, has a claim to be treated as a prisoner of war. Accordingly, Article 1 of the Convention lays down that it applies not only to combatants as defined in Article 1 of the Hague Regulations (see above, § 80), but also to members of levies *en masse* as defined in Article 2 of the Hague Regulations, and, generally, to combatants and non-combatants. Article 81 expressly enacts that non-combatant<sup>2</sup> members of armed forces, such as newspaper correspondents, reporters, sutlers,<sup>3</sup> and contractors, who are captured and detained, may claim to be treated as prisoners of war, provided that they can produce a certificate from the military authorities of the army which they were accompanying. Moreover, the Convention extends to persons who belong to the armed forces of the belligerents and who are captured in the course of operations at sea or in the air.<sup>4</sup> The conditions of capture may in such cases render necessary some departures from the provisions of the Convention, but such exceptions must not disregard the fundamental principles of the Convention and they must in any case cease when the captured persons reach a camp of prisoners of war. The Convention does not contain anything regarding the treatment of *private* enemy individuals, and enemy officials, whom a belligerent thinks it

Who may  
claim  
to be  
Prisoners  
of War.

*Reichsgericht* in the course of the so-called Leipzig Trials (*Annual Digest*, 1923-1924, Case No. 232). As to the interrogation of prisoners of war by their captors with a view to obtaining military information see Spaight, *Air*, pp. 340-345. For the extent to which prisoners of war were compelled or enabled to work by the various belligerents during the World War, the nature of their tasks, and the scales of their remuneration, see Garner, ii. §§ 350-353; Leopold, *Die Beschäftigung der Kriegsgefangenen* (1919).

<sup>1</sup> As showing that the work thus performed and its remuneration are not based on contract see *Daniels v. Germany* (Germano-French Mixed Arbitral Tribunal), *Annual Digest*, 1927-1928, Case No. 373.

<sup>2</sup> See above, § 79.

<sup>3</sup> A 'sutler' is defined by the Concise Oxford Dictionary as a 'camp-follower selling provisions, etc.'

<sup>4</sup> See also Articles 36-38 of the Air Warfare Rules drafted at The Hague in 1923 (§ 214d). And see in particular Spaight, *Air*, pp. 328-348, 410-420.

necessary<sup>1</sup> to make prisoners of war; but it is evident that they may claim all the privileges of such prisoners. They are not convicts, but are taken into captivity for military reasons, and are therefore prisoners of war.

And the same is valid with regard to enemy civilians who at the outbreak of war are on the territory of a belligerent, and, for military reasons, are interned. They are not convicts either, but are deprived of their liberty for military reasons only, and are therefore prisoners of war.<sup>2</sup>

Disciplinary  
Measures  
and  
Judicial  
Proceedings.

§ 128. Prisoners of war are subject to the laws and regulations of the armed forces of the captor. They must not be subjected to penalties other than those prescribed for similar acts by members of the forces of the captor; nor must they, while undergoing punishment, be exposed to treatment less favourable than that meted out to the latter. 'All forms of corporal punishment, confinement in premises not lighted by daylight and, in general, all forms of cruelty whatsoever are prohibited. Collective penalties for individual acts are also prohibited' (Article 46). Prisoners must not be deprived of their rank or of the privileges attaching thereto. After undergoing punishment they must not be treated differently from other prisoners. However, prisoners who have been punished as the result of an attempt to escape may, subject to the general safeguards of the Convention, be put under a special régime of surveillance. Prisoners who are recaptured after having succeeded in rejoining their armed forces must not be punished for their previous escape.

The Convention distinguishes between mere disciplinary punishment and the more serious punishment following upon judicial proceedings. In the case of disciplinary punishment<sup>3</sup>

<sup>1</sup> See above, §§ 116, 117.

<sup>2</sup> See above, § 100, and the author's Introduction to Roxburgh, *The Prisoners of War Information Bureau in London* (1915). In *R. v. Superintendent of Vine Street Police Station, ex parte Liebmann* [1916] 1 K.B. 268, it was held that an interned enemy subject had the status of a prisoner of war and was therefore not entitled to a writ of *habeas corpus* in order to test the legality of his internment;

for criticism of this decision see McNair, *Legal Effects of War* (1920), pp. 53-54.

<sup>3</sup> Article 52 lays down that the captor is bound to ensure that the utmost leniency be exercised in deciding the question whether an offence is to be followed by disciplinary punishment or by judicial proceedings. This applies particularly to the question of escape or attempted escape. In either case

(Articles 54-59) imprisonment not exceeding thirty days is the maximum penalty; the prisoners must not be transferred to prisons and other penitentiary establishments; they must be permitted to read and write, and to send and receive letters, but not parcels and money; adequate provision must be made for their health and physical fitness; and, finally, disciplinary punishment must not be awarded by persons other than the officer commanding the camp or detachment or by the responsible officer acting as his deputy. Special safeguards are provided, in Articles 60-67, for the case of judicial proceedings against prisoners of war. These safeguards include notification, in good time, of the protecting Power of the commencement of the proceedings, provision for proper defence, trial (which must, as a rule, be public), appeal, and communication of the sentence to the protecting Power. Capital sentences must not be carried out before the expiration of a period of at least three months after the receipt by the protecting Power of a detailed communication.

§ 129. The Convention of 1929 refers only incidentally to release on parole,<sup>1</sup> but Articles 10 to 12 of the Hague Regulations, which on this matter remain in force,<sup>2</sup> deal with release on parole<sup>3</sup> in the following manner: No belligerent is obliged to assent to a prisoner's request to be released on parole, and no prisoner may be forced to accept such release. But if the laws of his country authorise him to do so, and if he acquiesces, any prisoner may be released on parole. In such a case he is in honour bound scrupulously to fulfil the engagement he has contracted,

Release  
on Parole.

those aiding the escape incur only disciplinary punishment (Article 51). (It was originally intended to render such assistance immune from punishment, but the Conference eventually abandoned that view on the ground of camp discipline, and also because it was deemed contrary to principle to reconcile the punishment of the principal offenders with immunity accorded to accessories.) Also, escaped prisoners who are recaptured before they succeed in joining their own armed forces are liable only to

disciplinary punishment. For the disciplinary measures taken against prisoners by the various belligerents during the World War see Garner, ii. 354; Jaccard, *op. cit.*, pp. 110-111; Scholz in *Z.V.*, xi. (1918-1920) pp. 240-251.

<sup>1</sup> See below, § 130.

<sup>2</sup> See above, § 126.

<sup>3</sup> See Knorr, *Das Ehrenwort Kriegsgefangener in seiner geschichtlichen Entwicklung* (1916); Spaight, *Air*, pp. 345-347; and *Land Warfare*, §§ 96-101.

both as regards his own Government and the Government that released him. And his own Government is formally bound neither to request, nor to accept, from him any service incompatible with the parole given. Any prisoner released on parole and recaptured bearing arms against the belligerent who released him, or against his allies, forfeits the privilege of being treated as a prisoner of war, and may be tried by court-martial. The Hague Regulations do not lay down the punishment for such a breach of parole; but according to a customary rule of International Law the punishment may be capital.

Bureaux  
of Infor-  
mation.

§ 130. According to Article 77, every belligerent, and likewise a neutral State which receives and detains members of the armed forces of the belligerents, must establish on the commencement of war a bureau of information relative to prisoners of war in their territory. This bureau is intended to answer all inquiries about prisoners.<sup>1</sup> It must be furnished by all the services concerned with all the necessary information to enable it to make out, and keep up to date, a separate return for each prisoner, and it must, therefore, be kept informed of internments and changes as well as of admissions into hospital, of deaths, releases on parole, exchanges, and escapes. It must state in its return for each prisoner the regimental number, surname and name, age, place of origin, rank, unit, wounds, the surname of the father and the name of the mother, date and place of capture, of internment, of the wounds received, date of death, and any observations of a special character. This separate return must, after conclusion of peace, be sent to the Government of the other belligerent.

The bureau must likewise receive and collect all objects of personal use, valuables, letters, and the like, left by prisoners who have been released on parole, or repatriated, or who have escaped, or died in hospital or in ambulances, and must transmit these articles to those interested.

Article 79 provides for the establishment in a neutral country of a Central Agency charged with the duty of

<sup>1</sup> Information bureaux are exempt from fees on postal matter and similar charges mentioned above (§ 126b).

collecting all information regarding prisoners of war and transmitting it to their country or to the State in whose army they served.<sup>1</sup>

§ 130a. According to Articles 42-46, the prisoners themselves are in some measure allowed to co-operate in the execution of the provisions of the Convention. They have the right to bring before the military authorities, in whose hands they are, petitions concerning their treatment. They are entitled to communicate, for the same purpose, with the representatives of the protecting Powers. Their petitions and complaints must not give rise to any punishment even if they prove to be groundless. In any given locality prisoners of war must be authorised to appoint representatives to represent them before the military authorities and the protecting Powers. The Convention has adopted certain safeguards for facilitating the task of the representatives, in particular their correspondence with the military authorities and the protecting Powers.<sup>2</sup>

Secondly, it is recognised that the collaboration of neutral protecting Powers charged with the protection of the interests of the belligerent is a guarantee of the regular application of the Convention. In the fulfilment of their duties the protecting Powers may, subject to the approval of the belligerents in question, appoint, apart from their diplomatic (and, probably, consular) personnel, delegates from among their own nationals or the nationals of other neutral States. The representative of the protecting Power or the other recognised delegates must be permitted to proceed to any place, without exception, where prisoners of war are interned and to hold conversations with them, as a general rule without witnesses<sup>3</sup> (Article 86).

Finally, in the event of a dispute between the belligerents

<sup>1</sup> Such bureaux were set up at the outbreak of the World War; see Garner, ii, § 332. As to the bureau established by Great Britain see Roxburgh, *The Prisoners of War Information Bureau in London* (1915).

<sup>2</sup> In camps of officers the senior officer prisoner of highest rank is to be recognised as the intermediary between camp authorities and officers.

<sup>3</sup> This latter qualification was inserted as a safeguard in case of suspected abuse of the right of private interview for the purpose of espionage. It must be noted that, as stated in Article 88, the part of the protecting Powers is not intended to derogate from the humanitarian work of the International Red Cross Committee.



concerning the application of the Convention, 'the protecting Powers shall, as far as possible, lend their good offices with the object of settling the dispute' (Article 87). They may propose to the belligerents the holding of a conference in neutral territory. It is laid down that 'The belligerents shall be required to give effect to proposals made to them with this object' (*ibid.*). The protecting Power may submit for approval of the belligerents the name of a neutral subject or a person nominated by the International Red Cross Committee to take part in the conference.<sup>1</sup>

According to Article 84 the text of the Convention and of any supplementary agreements concluded by the belligerents must be posted, whenever possible, in the native language of the prisoners of war, in places where they may consult them.

In regard to the so-called general participation clause and the right of denunciation, the Convention enacts provisions identical with those adopted by the Convention concerning the treatment of sick and wounded (Articles 82, 95, and 96).<sup>2</sup>

Relief  
Societies.

§ 131. Article 78 makes it a duty for every belligerent to grant facilities to relief societies to serve as intermediaries for charity to prisoners of war. The condition of the admission of such societies and their agents is that the former are regularly constituted in accordance with the law of their country. Delegates of such societies must be admitted to the places of internment for the distribution of relief, as also to the halting-places of repatriated prisoners, under a personal permit of the military authorities, provided they give an engagement in writing that they will comply with all regulations by the authorities for order and police.

Prisoners  
of War  
during the  
World  
War.

§ 131a. The rules of the Hague Convention which were in force during the World War had been laid down in time of peace; and in war the attitude of belligerents towards prisoners is liable to change. All the States involved in the World War charged one another with violating the Hague Regulations by the maltreatment of prisoners of war, and at an early stage they arranged for inspection by neutral

<sup>1</sup> The Conference in 1929 discussed proposals for more tangible machinery for settling the disputes arising out of the application of the Convention,

but these proposals were not accepted. See Rasmussen, *op. cit.*, pp. 63-66.

<sup>2</sup> See above, § 124a.

representatives of the camps on their territory. The reports of the inspectors disclosed conditions at certain times in certain German camps which were very bad, and made it clear that almost everywhere in Germany prisoners were suffering great hardships through insufficient food and clothing. The reports on British and French camps were almost uniformly satisfactory.<sup>2</sup> None the less, Germany disbelieved them, and resorted to reprisals for the alleged maltreatment of German prisoners, while the Allies, in their turn, feared that conditions in the camps in Germany were even worse than appeared from the reports. Whatever may be the evidentiary value of some of the charges, undoubtedly the Hague Regulations were grievously violated by Germany in letter and in spirit.

During 1916, Great Britain, France, and Germany mutually agreed to transfer to Switzerland, for internment there, wounded prisoners and those suffering from certain diseases, and to repatriate certain classes of interned civilians. Germany and Russia later reached an agreement for the repatriation of incapacitated prisoners. In 1918, France and Germany arranged to repatriate those combatant prisoners (other than officers) who had been long in captivity and were over a given age, and a similar agreement between Great Britain and Germany was under negotiation when hostilities ended.<sup>3</sup>

§ 132. Captivity can come to an end in different ways. End of Captivity. Apart from release on parole, and exchange, which have already been mentioned, it comes to an end—(1) through simple release or repatriation<sup>4</sup> without parole<sup>5</sup>; (2) through

<sup>1</sup> See details in Garner, ii. §§ 333-334.

<sup>2</sup> For a German account see Kirchenheim in *Strupp, Wört.*, iii. pp. 456-463, and the literature there cited.

<sup>3</sup> See details in Garner, ii. § 357-360. And see the agreement between the United States and Germany, of November 11, 1918, concerning prisoners of war, sanitary personnel, and civil prisoners. Although this agreement was not ratified, because hostilities came to an end through the general armistice of the same date, it is of great importance. Many of its pro-

visions inspired the rules and recommendations of the Convention of 1929. See *A.J.*, xiii. (1919) pp. 97-101, and Suppl., pp. 1-72.

<sup>4</sup> As to the ending of captivity through repatriation of sick or disabled persons see above, § 119.

<sup>5</sup> The Convention envisages the possibility of repatriation or accommodation in a neutral country of prisoners of war in good health who have been in captivity for a long time. The persons thus repatriated must not be employed on active military service (Articles 72-74).

successful escape ; (3) through liberation by an invasion of the army to which the prisoners belong ; (4) through prisoners<sup>1</sup> being brought into neutral territory by captors who take refuge there ; and, lastly, (5) through the war coming to an end. Release of prisoners for ransom is no longer practised, except in the case of the crew of a captured merchantman released on a ransom bill.<sup>2</sup> But the practice of ransoming prisoners might be revived if convenient, provided that the ransom is to be paid, not to the individual captor, but to the belligerent whose forces made the capture.

As regards the end of captivity through the war coming to an end, a distinction must be made according to the different modes of ending war. If the war ends by peace being concluded, captivity comes to an end at once<sup>3</sup> with the conclusion of peace, and, as Article 75 expressly enacts, the repatriation of prisoners must be effected as speedily as possible thereafter.<sup>4</sup> If, however, the war ends through conquest and annexation of the vanquished State, captivity comes to an end as soon as a condition of peace is in fact established. Captivity ought to end with annexation, and it will in most cases do so.

## V

### APPROPRIATION AND UTILISATION OF PUBLIC ENEMY PROPERTY

Grotius, iii. c. 5—Vattel, iii. §§ 73, 160-164—Hall, §§ 136-138—Westlake, ii. pp. 113-121—Lawrence, §§ 171-175—Maine, pp. 192-206—Manning, pp. 179-193—Twiss, ii. §§ 62-71—Halleck, ii. pp. 73-82—Moore, vii. § 1148—Taylor, §§ 529-536—Wharton, iii. § 340—Wheaton, §§ 346, 352-354—Bluntschli, §§ 644-651a—Heffter, §§ 130-136—Lueder in *Holtzendorff*, iv. pp. 488-500—G. F. Martens, ii. §§ 279-280—Ullmann, § 183—Fauchille,

<sup>1</sup> See below, § 337.

<sup>2</sup> See below, § 195.

<sup>3</sup> That, nevertheless, the prisoners remain under the discipline of the captor until they have been handed over to the authorities of their home State will be shown below, § 275.

<sup>4</sup> Article 75 lays down that armistice conventions, if any, shall include provisions concerning the repatriation

of prisoners of war, and that, failing such provisions, the belligerents shall enter into communication with each other on the question as soon as possible. On the analogy of Article 212 of the Treaty of Versailles, the Convention envisages agreements between the belligerents for instituting commissions for searching for scattered prisoners and their expatriation.

§§ 1176-1193 (2)—Despagnet, Nos. 592-604—Pradier-Fodéré, vii. Nos. 2989-3018—Rivier, ii. pp. 306-314—Nys, iii. pp. 252-266—Calvo, iv. §§ 2199-2214—Fiore, iii. Nos. 1389, 1392, 1393, 1470, and *Code*, Nos. 1562-1565—Martens, ii. § 120—Longuet, § 96—Mérignhac, iii<sup>a</sup>. pp. 459-494—Pillet, pp. 249-254—Garner, ii. § 398—Rolin, §§ 543-557—Cruchaga, §§ 895-906—Keith's Wheaton, pp. 801-812—Mérignhac-Lémonon, i. pp. 605-619—*Kriegsbrauch*, pp. 57-60—Holland, *War*, Nos. 113-116—*Land Warfare*, §§ 426-432—Meurer, ii. §§ 65-69—Spaight, *Land*, pp. 410-418—Zorn, pp. 243-270—Rouard de Card, *La guerre continentale et la propriété* (1877)—Bluntschli, *Das Beuterecht im Krieg, und das Seebeuterecht insbesondere* (1878)—Depambour, *Des effets de l'occupation en temps de guerre sur la propriété et la jouissance des biens publics et particuliers* (1900)—Wehberg, *Das Beuterecht im Land und Seekriege* (1909; an English translation appeared in 1911 under the title *Capture in War on Land and Sea*)—Latifi, *Effects of War on Property* (1909)—Huber in *R.G.*, xx. (1913) pp. 657-697—Rundstein in *R.I.*, 3rd ser., vi. (1925) pp. 607-614.

§ 133. Under a former rule of International Law, belligerents could appropriate all public and private<sup>1</sup> enemy property which they found on enemy territory. This rule is now obsolete. Its place is taken by several rules, since distinctions are to be made between moveable and immoveable property, between public and private property, and, further, between different kinds of public and private property. These rules must be discussed *seriatim*.

Appropriation of all the Enemy Property no longer admissible.

§ 134. Appropriation of public immoveables is not lawful so long as the territory on which they are has not become State property of the occupant through annexation. During mere military occupation<sup>2</sup> of enemy territory, a belligerent may not sell, or otherwise alienate, public enemy land and buildings, but may only appropriate their produce. Article 55 of the Hague Regulations expressly enacts that a belligerent occupying enemy territory shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile State and situated on the occupied territory;

Immoveable Public Property.

<sup>1</sup> It is impossible for a treatise to go into historical details, and to show the gradual disappearance of the old rule. Even during the nineteenth century—see, for instance, G. F. Martens, ii. § 280; Twiss, ii. § 64—it was asserted that in strict law all private enemy moveable property found on enemy territory was as much booty as public property, although the growth of a usage was

recognised which under certain conditions exempted it from appropriation. In the face of Articles 46 and 47 of the Hague Regulations these assertions have no longer any basis, and all the text-books of the nineteenth century are now antiquated with regard to this matter.

<sup>2</sup> As to occupation of enemy territory see below, §§ 166-172.

and that he must protect the stock and plant, and administer them according to the rules of usufruct. He may, therefore, sell the crops from public land, cut and sell timber in the public forests,<sup>1</sup> let public land and buildings for the time of his occupation, and the like. He is, however, only usufructuary, and is, therefore, prohibited from exercising his right in a wasteful or negligent way so as to decrease the value of the stock and plant. Thus, for instance, he must not cut down a whole forest, unless the necessities of war compel him.<sup>2</sup>

Immove-  
able  
Property  
of Muni-  
cipalities,  
and of  
Religious,  
Charit-  
able, and  
the like  
Institu-  
tions.

§ 135. It must, however, be observed that only the produce of public immoveables belonging to the State itself may be appropriated, and not the produce of those belonging to municipalities, or of those which, although they belong to the hostile State, are permanently set aside for religious purposes, for the maintenance of charitable and educational institutions, or for the benefit of art<sup>3</sup> and science. Article 56 of the Hague Regulations expressly enacts that such property is to be treated as private property.

Utilisa-  
tion of  
Public  
Buildings.

§ 136. So far as the necessities of war demand, a belligerent may make use of public enemy buildings for all kinds of purposes. Troops must be housed, horses stabled, the sick and wounded nursed. Public buildings may in the first instance, therefore, be made use of for such purposes, although they may thereby be considerably damaged. And it matters not whether the buildings belong to the enemy State or to municipalities, whether they are regularly destined for ordinary governmental and municipal purposes, or for religious, educational, scientific, and similar purposes. Thus, churches may be converted into hospitals, schools into barracks, buildings used for scientific research into

<sup>1</sup> For details of the German practice during the World War see Garner, ii. § 398, and see the case referred to in § 282 below. During the occupation of part of Poland in 1939 and 1940 Germany was reported to have resorted to general confiscation of the property of the Polish State.

<sup>2</sup> See *In re Falck* (decided by the French Court of Cassation; *Annual Digest*, 1927-1928, Case No. 383),

reaffirming the principle of usufruct and quashing the decision of the court below, which held (*ibid.*, 1925-1926, Case No. 367) that Article 55 must be interpreted in a liberal manner in accordance with the requirements of modern warfare with its immense immobilised armies and their immense variety of wants in the matter of food and war material.

<sup>3</sup> See Ch. de Visscher in *R.I.*, 3rd ser., xvi. (1935) pp. 246-256.

stables. But it must be observed that such utilisation of public buildings as damages them is justified only if it is necessary. A belligerent who turned a picture gallery into stables without being compelled thereto would certainly commit a violation of the Law of Nations.

§ 137. Moveable public enemy property may certainly be appropriated by a belligerent, provided that it can directly or indirectly be useful for military operations. Article 53 of the Hague Regulations unmistakably enacts that a belligerent occupying hostile territory may take possession of the cash, funds, realisable securities,<sup>1</sup> depots of arms, means of transport, stores, supplies, appliances (on land, or at sea, or in the air) adapted for the transmission of news or for the transport of persons or goods, and of all other moveable property of the hostile State which may be used for military operations. Thus, a belligerent is entitled to seize not only the money and funds<sup>2</sup> of the hostile State, munitions of war, depots of arms, stores and supplies, but also the rolling stock of public railways<sup>3</sup> and other means of transport, and everything and anything that he can directly or indirectly make use of for military operations. He may, for instance, seize a quantity of cloth for the purpose of clothing his soldiers.

§ 138. But just as the produce of certain public immovables may not be appropriated, so certain public moveables

Moveable  
Public  
Property.

Moveable  
Property  
of Munici-  
palities,  
and of  
Religious,  
Charit-  
able, and  
the like  
Institu-  
tions.

<sup>1</sup> See *Tajtel v. Ministry of Agriculture and State Lands, Annual Digest, 1923-1924*, Case No. 246, and *Rundstein in R.I.*, 3rd ser., vi. (1925) pp. 607-614, for the case of a Polish landowner whose estate was hypothecated in 1911 to the Russian Treasury by judicial decree as security for the sum of 10,916 roubles. During the German occupation of this district of Poland in the World War he settled the claim with the German authorities for 3800 roubles. After the war the Polish Supreme Court refused to recognise the settlement of the claim and the cancellation of the mortgage. See also *Kaufmann, Kriegführende Staaten als Schuldner und Gläubiger feindlicher Staatsangehöriger* (1915), p. 67.

<sup>2</sup> As regards the funds of public banks see *Schiemann, Rechtslage der*

*öffentlichen Banken im Kriegsfall* (1902), pp. 39-64, and *Dicker, Unterliegt die Reichsbank im Kriegsfall dem Beuterecht des Feindes?* (1912), especially pp. 58-69; see also *Huber in R.G.*, xx. (1913) pp. 667-679. As to the funds of private banks see below, § 143a.

<sup>3</sup> See *Nowacki, Die Eisenbahnen im Kriege* (1906), §§ 15, 19. Some writers—see, for instance, *Fauchille*, No. 1185, and *Wehberg, op. cit.*, p. 22—maintain that such rolling stock may not be appropriated, but may only be made use of during war, and must be restored after the conclusion of peace. The assertion that Article 53, second paragraph, is to be interpreted in that sense, is unfounded, for restoration is there stipulated for such means of transport and the like as are private property.

may not be appropriated. For Article 56 of the Hague Regulations exempts the property of municipalities, of religious, charitable, or educational institutions, and of institutions devoted to science or art. Thus the moveable property of churches, hospitals, schools, universities, museums, and picture galleries, even when belonging to the hostile State, cannot lawfully be appropriated by a belligerent. As regards archives, they are no doubt of scientific value, but a belligerent may nevertheless seize such State papers deposited therein as are of importance to him in connection with the war.

Moveable  
Public  
Property  
during  
the World  
War.

§ 138a. Such are the rules regarding moveable public property found in enemy territory; but they were during the World War systematically violated by the Central Powers, which carried off public moveable property of all kinds, even though of no military value, following the example of Napoleon I., who seized works of art during his numerous wars and had them taken to the galleries of Paris. But just as the property seized by Napoleon had to be restored to its former owners in 1815, the property taken away by the Central Powers had to be restored under the Armistices and the Treaties of Peace.<sup>1</sup>

Booty  
on the  
Battle-  
field.

§ 139. The case of moveable enemy property found by an invading belligerent on enemy territory is different from that of moveable enemy property on the battlefield. According to a former rule of the Law of Nations, all enemy property, public or private, which a belligerent could get hold of on the battlefield was booty, and could be appropriated. Although some modern authors <sup>2</sup> who wrote before the Hague Conference of 1899 teach the validity of this rule, it is obvious from Articles 4 and 14 of the Hague Regulations as well as from Article 6 of the Prisoners of War Convention of 1929,<sup>3</sup> that it is now obsolete as regards *private* <sup>4</sup> enemy property, except military papers, arms, horses, and the like. But as regards *public* enemy property, this customary

<sup>1</sup> Thus Article 245 of the Treaty of Peace with Germany provides for the restoration of the trophies, archives, historical souvenirs, or works of art carried away from

France by the German authorities. See also Articles 238, 244, Annexes.

<sup>2</sup> See, for instance, Heffter, § 135.

<sup>3</sup> See above, § 126a.

<sup>4</sup> See above, § 124, and below, § 144.

rule is still valid. Thus not only weapons, munitions, and valuable pieces of equipment which are found upon the dead, wounded, and prisoners may be seized, but also the war-chest and State papers in possession of a captured commander, enemy horses, batteries, carts, and all other public property found on the field of battle that is of value. To whom the booty ultimately belongs is not for International but for Municipal Law<sup>1</sup> to determine, since International Law simply states that public enemy property on the battlefield can be appropriated by belligerents. The restriction in Article 53 of the Hague Regulations that only such moveable property may be appropriated as can be used for the operations of war, does not apply to property found on the battlefield, for Article 53 speaks of 'an army of occupation' only. Such property may be appropriated, whether it can be used for military operations or not; the mere fact that it was seized on the battlefield entitles a belligerent to appropriate it.

## VI

### APPROPRIATION AND UTILISATION OF PRIVATE ENEMY PROPERTY

Grotius, iii. c. 5—Vattel, iii. §§ 73, 160-164—Hall, §§ 139, 141-144—Westlake, ii. pp. 103-104—Lawrence, §§ 172-175, 179—Maine, pp. 192-206—Manning, pp. 179-183—Twiss, ii. §§ 62-71—Halleck, ii. pp. 82-85—Moore, vii. §§ 1121, 1151, 1152, 1155—Taylor, §§ 529, 532, 537—Wharton, iii. § 338—Wheaton, § 355—Bluntschli, §§ 652, 656-659—Heffter, §§ 130-136—Lueder in *Holtzendorff*, iv. pp. 488-500—G. F. Martens, ii. §§ 279-280—Ullmann, § 183—Fauchille, §§ 1194-1206, 1227-1320—Despagnet, Nos. 579-590—Pradier-Fodéré, vii. Nos. 3032-3047—Rivier, ii. pp. 318-323—Nys, iii. pp. 252-266—Calvo, iv. §§ 2220-2229—Fiore, iii. Nos. 1391, 1392, 1472, and *Code*, Nos. 1535-1536, 1622-1623—Martens, ii. § 120—Longuet, §§ 97-98—Mérignhac, iii. pp. 418-427—Pillet, pp. 333-342—Gemma, pp. 341-344—Rolin, §§ 487-496, 521-542—Mérignhac-Lémonon, i. pp. 480-586—*Kriegsbrauch*, pp. 53-56—Zorn, pp. 270-283—Meurer, ii. § 54—Spaight, *Land*, pp. 188-201—Garner, ii. §§ 395-397, 399—Holland, *War*, Nos. 106-107—*Land Warfare*, §§ 407-415—Bentwich, *The Law of Private Property in War*

<sup>1</sup> According to British Law, all booty belongs to the Crown. See German *Reichsgericht* in *Annual Digest*, 1923-1924, Case No. 236.



(1907)—Borchard, § 104—Scholz, *Privateigentum im besetzten und unbesetzten Feindesland* (1919)—Paolucci, *La guerra e la condizione giuridica della proprietà privata* (1918)—Udina in *Rivista*, 3rd ser., v. (1926) pp. 26-72—Sachocki in *R.G.*, xxxv. (1928) pp. 410-432. See also the monographs of Rouard de Card, Bluntschli, Depambour, Wehberg, and Latifi, quoted above at the commencement of § 133.

Immove-  
able  
Private  
Property.

§ 140. Immoveable private enemy property may under no circumstances or conditions be appropriated by an invading belligerent. Should he confiscate and sell private land or buildings, the buyer would acquire no right<sup>1</sup> whatever to the property. Article 46 of the Hague Regulations expressly enacts that 'private property may not be confiscated.'<sup>2</sup> But confiscation differs from the temporary use of private land and buildings for all kinds of purposes demanded by the necessities of war. What has been said above<sup>3</sup> with regard to utilisation of public buildings applies equally<sup>4</sup> to private buildings. If necessary, they may be converted into hospitals, barracks, and stables without compensation for the proprietors, and they may also be converted into fortifications. A humane belligerent will not drive the wretched inhabitants into the street if he can help it. But under the pressure of necessity he may be obliged to do this, and he is certainly not prohibited from doing it.

Private  
War  
Material  
and  
Means of  
Trans-  
port.

§ 141. All kinds of private moveable property which can serve as war material, such as arms, ammunition, cloth for uniforms, leather for boots, saddles, and also all appliances (whether on land or at sea or in the air) which are adapted for the transmission of news or for the transport of persons and goods, such as railway rolling stock,<sup>5</sup> ships, telegraphs, telephones, carts, and horses, may be seized and made use of for military purposes by an invading belligerent; but

<sup>1</sup> See below, § 283.

<sup>3</sup> § 136.

<sup>2</sup> Although the Hague Regulations cannot literally be applied in occupied enemy colonies populated by natives and having only a few white settlers, their real estate must not be sold, as was done in German East Africa, Togoland, Samoa, and the Cameroons during the World War. On confiscation of property by the German occupation authorities in Poland during the World War by way of penalty see Sachocki in *R.G.*, xxxv. (1928) pp. 410-432.

<sup>4</sup> The Hague Regulations do not mention this; they simply enact in Article 46 that private property must be 'respected,' and may not be confiscated.

<sup>5</sup> See Nowacki, *Die Eisenbahnen im Kriege* (1906), § 15. Different, of course, is the seizure of the railway tracks, and their removal to other countries, as to which see Garner, ii. § 397.

they must be restored at the conclusion of peace, and compensation must be paid for them. This is expressly enacted by Article 53 of the Hague Regulations. It is evident that the seizure of such material must be duly acknowledged by receipt, although Article 53 does not say so; for otherwise how could compensation be paid after the conclusion of peace? As regards the question who is to pay the compensation, Holland<sup>1</sup> correctly maintains that 'the Treaty of Peace must settle upon whom the burden of making compensation is ultimately to fall.'

§ 142. On the other hand, works of art and science, and historical monuments, may not under any circumstances or conditions be appropriated or made use of for military operations. Article 56 of the Hague Regulations enacts categorically that 'all seizure' of such works and monuments is prohibited.<sup>2</sup> Therefore, although the metal of which a statue is cast may be of the greatest value for cannons, it must not be touched.

Works of  
Art and  
Science,  
Historical  
Monu-  
ments.

§ 143. Private personal property which does not consist of war material or means of transport serviceable for military operations may not as a rule be seized.<sup>3</sup> Articles 46 and 47 of the Hague Regulations expressly stipulate that 'private property may not be confiscated,' and 'pillage is formally prohibited.'<sup>4</sup> But it must be emphasised that these rules have, in a sense, exceptions demanded and justified by the necessities of war. Men and horses must be fed; men must protect themselves against the weather. If there is no time for ordinary requisitions<sup>5</sup> to provide food, forage, clothing, and fuel, or if the inhabitants of a locality have fled, so that ordinary requisitions cannot be made, a belligerent must take these articles wherever he can get them, and he is justified<sup>6</sup> in so doing. Moreover, quartering of soldiers (who, together with their horses, must be well fed by the in-

Other  
Private  
Personal  
Property.

<sup>1</sup> War, § 113.

<sup>2</sup> See Ch. de Visscher in *R.J.*, 3rd ser., xvi. (1935) pp. 256-288.

<sup>3</sup> See above, § 133 (n.). Nor may the occupant liquidate the businesses of enemy subjects in occupied territory, although he can control them, and must certainly not sell their real estate (see above, § 140), even if the

proceeds are to be handed over to them after the war.

<sup>4</sup> For an illustration see *Mazzoni v. Ministry of Finance* (Court of Venice), *Annual Digest*, 1927-1928, Case No. 384.

<sup>5</sup> See below, § 147.

<sup>6</sup> The Hague Regulations do not mention this case.

habitants of the houses where they are quartered) is likewise lawful, although it may be ruinous to the private individuals upon whom they are quartered.<sup>1</sup>

Moveable  
Private  
Property  
in the  
World  
War.

§ 143a. Such are the rules regarding moveable private property found in enemy territory; but they were systematically violated by the Central Powers during the World War. Live stock, particularly cattle and horses, were seized in Belgium and the occupied parts of France and carried off to Germany.<sup>2</sup> Factories and workshops were dismantled and their machinery and materials carried away.<sup>3</sup> Cash was taken from private banks.<sup>4</sup> These are but examples of the wholesale seizure of private property practised by Germany and her allies in the countries which they occupied.<sup>5</sup> However, reparation was stipulated for under the Armistices and Treaties of Peace.<sup>6</sup>

Booty  
on the  
Battle-  
field.

§ 144. Private enemy property on the battlefield is no longer in every case an object of booty.<sup>7</sup> Arms, horses, and military papers may indeed be appropriated,<sup>8</sup> even if they are private property, as may also private means of transport, such as carts and other vehicles which an enemy has made use of. But letters, cash, jewellery, and other articles of value found upon the prisoners of war must not, according to Article 16 of the Convention of 1929, be taken away from them (see above, § 126a),<sup>9</sup> and according to Article 4 of the Convention of 1929 concerning the sick and wounded the belligerents are bound to collect and transmit to each other all articles of a personal nature found on the battlefield or on the dead.

<sup>1</sup> See below, § 147.

<sup>2</sup> See Garner, ii. § 395, who quotes Lord R. Cecil as stating on March 19, 1918, 'Belgium had 1,500,000 cattle; we know that practically half of these have gone to Germany.'

<sup>3</sup> See Garner, ii. § 396. French and Belgian authorities, while occupying the left bank of the Rhine after the Armistice, instituted criminal proceedings against German manufacturers who had previously bought the machines and plant carried away by the German military administration. Hippel, in *Z.V.*, xxviii. (1919) pp. 184-206; and see Nast in *R.G.*, xxvi. (1919) pp. 111-128.

<sup>4</sup> See Garner, ii. § 399.

<sup>5</sup> See also below, § 147.

<sup>6</sup> For instance, the Treaty of Versailles, Articles 238 and 244, Annexes.

<sup>7</sup> See above, § 139.

<sup>8</sup> See above, § 139, and Article 4 of the Hague Regulations. This article only mentions arms, horses, and military papers; but saddles, stirrups, and the like go with horses, as ammunition goes with arms, and these may for this reason likewise be appropriated: see *Land Warfare*, § 69, note (e).

<sup>9</sup> See also § 130 above, on the functions of Information Bureaux in this connection.

§ 145. Such is the position of a private property found by a belligerent on enemy territory; different, however, is the case of enemy private property brought into the territory of a belligerent during war. Since such property found there at the outbreak of war may not be confiscated,<sup>1</sup> and private property found on enemy territory is nowadays likewise, as a rule, exempt from confiscation, there can be no doubt that private enemy property brought into a belligerent's territory during time of war may not, as a rule, be confiscated.<sup>2</sup> On the other hand, a belligerent may prohibit the withdrawal of articles of property which can be used by the enemy for military purposes, such as arms, ammunition, provisions, and the like. And by analogy with Article 53 of the Hague Regulations, there can be no doubt that a belligerent may seize such articles and use them for military purposes, provided that he restores them at the conclusion of peace and pays compensation for them.

Private  
Enemy  
Property  
brought  
into a  
Belli-  
gerent's  
Territory.

## VII

### REQUISITIONS AND CONTRIBUTIONS

Vattel, iii. § 165—Hall, §§ 140-140\*—Lawrence, § 180—Westlake, ii. pp. 106-113—Maine, p. 200—Twiss, ii. § 64—Halleck, ii. pp. 68-70—Taylor, §§ 538-539—Moore, vii. § 1146—Bluntschli, §§ 653-655—Heffter, § 131—Lueder in *Holtendorff*, iv. pp. 500-510—Ullmann, § 183—Fauchille, §§ 1207-1226—Despagnet, Nos. 587-590—Pradier-Fodéré, vii. Nos. 3048-3064—Rivier, ii. pp. 324-327—Nys, iii. pp. 328-392—Calvo, iv. §§ 2231-2284—Fiore, iii. Nos. 1394, 1473-1476, and *Code*, Nos. 1565, 1614-1620—Martens, ii. § 120—Longuet, §§ 110-114—Mérignac, iii<sup>a</sup>. pp. 427-459—Pillet, pp. 215-235—Zorn, pp. 283-315—*Kriegsbrauch*, pp. 61-63—Holland, *War*, Nos. 111-112—Bordwell, pp. 314-324—Meurer, ii. §§ 56-64—Spaight, *Land*, pp. 381-408—Ariga, §§ 116-122—Rolin, §§ 497-520—Mérignac-Lémonon, i. pp. 568-605—*Strupp*, *Wört.*, i. 754-759, ii. 354-356—Hyde, ii. §§ 691-693—Garner, ii. §§ 387-394, and in *A.J.*, xi. (1917) pp. 74-112—*Land Warfare*, §§ 416-425—Thomas, *Des réquisitions militaires* (1884)—Keller, *Requisition und Kontribution* (1898)—Pont, *Les réquisitions militaires du temps de guerre* (1905)—Albrecht, *Requisitionen von neutralem Privateigentum, etc.* (1912), pp. 1-24

<sup>1</sup> See above, § 102, and note on that passage.

<sup>2</sup> The case of enemy merchantmen seized in a belligerent's territorial waters is, of course, an exception,

as is also the case of enemy goods found by a belligerent on one of his own merchantmen and seized in one of his ports. See above, §§ 102a, 102b, and below, §§ 177 (n.), 197 (n.).

—Gregory, *Contributions and Requisitions in War* (1915)—Roquette, *Kontributionen* (1916)—Borchard, § 105—Ferrand, *Des réquisitions en matière de droit international public* (1917)—Butler and Maccoby, *The Development of International Law* (1928), pp. 143-148—Risley in the *Journal of the Society of Comparative Legislation*, New Ser., ii. (1900) pp. 214-223—Udina in *Rivista*, xviii. (1926) pp. 26-71—Stauffenberg in *Z.ö.V.*, ii. (1931) pp. 86-102.

War must  
support  
War.

§ 146. Requisitions and contributions in war are the outcome of the eternal principle that war must support war.<sup>1</sup> This means that every belligerent may make his enemy pay, as far as possible, for the continuation of the war. But this principle, though it is as old as war, and will only die with war itself, has not the same effect in modern times on the actions of belligerents as it formerly had. For thousands of years, belligerents used to appropriate all private and public enemy property they could obtain; and when modern International Law grew up, this practice found legal sanction. But after the end of the seventeenth century this practice grew milder, under the influence of the experience that the provisioning of armies in enemy territory became more or less impossible when the inhabitants were treated according to the old principle. Although belligerents retained, in strict law, the right to appropriate all private as well as all public property, it became usual to abstain from enforcing this right, and in lieu thereof to impose contributions of cash and requisitions in kind upon the inhabitants of the invaded country.<sup>2</sup> When this usage developed, no belligerent ever thought of paying in cash for requisitions, or giving a receipt for them. But in the nineteenth century another practice became usual; and commanders often gave a receipt for contributions and requisitions, in order to avoid abuse, and to prevent further demands for fresh contributions and requisitions by succeeding commanders without knowledge of the former impositions. And there are cases during the nineteenth century on record in which belligerents actually paid in

<sup>1</sup> Concerning the controversy as to the justification of requisitions and contributions see Albrecht, *op. cit.*, pp. 18-21.

<sup>2</sup> An excellent sketch of the histor-

ical development of the practice of requisitions and contributions is given by Keller, *Requisition und Kontribution* (1898), pp. 5-26.

cash for all requisitions they made. The usual practice at the end of the nineteenth century was that commanders always gave a receipt for contributions, and that they either paid in cash for requisitions, or acknowledged them by receipt, so that the inhabitants could be indemnified by their own Government after conclusion of peace. However, no restriction whatever was imposed upon commanders with regard to the amount of contributions and requisitions, or with regard to the proportion between the resources of a country and the burden imposed.

The Hague Regulations made a progressive settlement of the question by enacting rules which put it on a wholly new basis. That war must support war remains a principle under these Regulations also. But they were widely influenced by the demand that the enemy State as such, and not the private enemy individuals, should be made to support the war, and that only so far as the necessities of war demanded it, should contributions and requisitions be imposed. Although, therefore, certain public moveable property and the produce of public immoveables may be appropriated as heretofore,<sup>1</sup> requisitions must be paid for in cash or, if this is impossible, acknowledged by receipt.

§ 147. Requisition is the name for the demand for the supply of all kinds of articles necessary for an army, such as provisions for men and horses, clothing, or means of transport.<sup>2</sup> Requisition of certain services may also be made, but they will be treated<sup>3</sup> together with occupation of enemy territory, requisitions in kind only being within the scope of this section. Now, what articles may be demanded by an army cannot once for all be laid down, as they depend upon its actual needs. According to Article 52 of the Hague Regulations, requisitions may be made, from municipalities as well as from the inhabitants, but so far only as they are really

Requisitions in Kind, and Quartering.

<sup>1</sup> See above, §§ 134, 137.

<sup>2</sup> For a refutation of the suggestion that a requisition is of a contractual nature see *Polyzene Plessa v. Turkish Government* (Greco-Turkish Mixed Arbitral Tribunal), *Annual Digest*, 1927-1928, Case No. 382. See also *Stauffenberg* in *Z.ö.V.*, ii. (1931) pp. 86-102. On the legal nature of

requisitions see also *Leon v. German State* (Germano-Roumanian Mixed Arbitral Tribunal), *Annual Digest*, 1929-1930, Case No. 295; *Poznanski v. German State* (Germano-Polish Mixed Arbitral Tribunal), *ibid.*, Case No. 298.

<sup>3</sup> See below, § 170.

necessary for the army of occupation; they must not be made in order to supply the belligerent's general needs.<sup>1</sup> They may not be made by individual soldiers or officers, but only by the commander in the locality. All requisitions must be paid for in cash, and if this is impossible they must be acknowledged by receipt,<sup>2</sup> and the payment of the amount must be made as soon as possible.<sup>3</sup> The principle that requisitions must be paid for by the enemy is thereby absolutely recognised, but, of course, commanders-in-chief may levy contributions<sup>4</sup> in case they do not possess cash for payment of requisitions. However this may be, from the rule that requisitions must always be paid for, it again becomes clear and beyond all doubt that private enemy property is, as a rule, exempt from appropriation by an invading army.<sup>5</sup>

<sup>1</sup> Article 52 was entirely ignored by the Germans while they occupied Belgium and part of France during the World War, for they made requisitions, not only for the needs of the army of occupation, but for the needs of Germany in general. See details in Ferrand, *op. cit.*, pp. 434-444, and Garner, ii. § 393; and see *B.Y.*, 1923-1924, pp. 179-180. Liszt, § 61, 5 (a), justifies Germany's action in this respect on the ground of the necessity imposed upon her by the 'hunger-blockade.' And see to the same effect the decisions of the German *Reichsgericht*: *Annual Digest*, 1919-1922, Case No. 296; 1923-1924, Case No. 230. See also *In re Falck* (a French case) referred to above, § 134.

<sup>2</sup> See Garner, ii. § 393.

<sup>3</sup> The Mixed Arbitral Tribunals established after the World War held repeatedly that although a requisition as originally effected may not have been contrary to International Law, it becomes so when, after a reasonable time, no adequate compensation is forthcoming. See *Goldenberg Sons v. Germany* (Special Arbitral Tribunal between Roumania and Germany), *Annual Digest*, 1927-1928, Case No. 369; *Karmatzucas v. Germany*, *ibid.*, 1925-1926, Case No. 365.

<sup>4</sup> See below, § 148.

<sup>5</sup> There has been some conflict of

judicial authority on the question whether requisitions effected in contravention of Article 52 were valid in the meaning of effecting a change in the title. It was held in *Tesdorpf v. German State* (Anglo-German Mixed Arbitral Tribunal) that although some coffee requisitioned in Belgium was, contrary to the provisions of Article 52, sent to Germany for the use of the army there, the requisition was not void in International Law and deprived the plaintiffs of their property there and then: *Annual Digest*, 1919-1922, Case No. 340. See also to the same effect *Ralli Brothers v. German State* (Anglo-German Mixed Arbitral Tribunal), *ibid.*, 1923-1924, Case No. 244. On the other hand, the Franco-German Mixed Arbitral Tribunal held in *Gros Roman et Cie. v. German State* (*ibid.*, Case No. 245) that a requisition in such circumstances did not transfer the property in the requisitioned goods. The Polish Supreme Court in *Sinta v. Gużkowski* (*ibid.*, 1919-1922, Case No. 342) was of the same view. The Belgian Court of Cassation held that a requisition unaccompanied by a receipt or payment was no more capable of transferring property than theft: *Laurent v. Le Jeune* (*ibid.*, Case No. 343). This was also the view of the Hungarian Supreme Court (*ibid.*, p. 482). For an interesting decision of the Czechoslovak

A special kind of requisition is the quartering<sup>1</sup> of soldiers in the houses of private inhabitants of enemy territory, who are required to supply lodging and food for them, and sometimes also stabling and forage for horses. Although the Hague Regulations do not specially mention quartering, Article 52 is nevertheless to be applied to it, since quartering is nothing else than a special kind of requisition. If cash cannot be paid at once for quartering, every inhabitant concerned must get a receipt for it, stating the number of soldiers quartered, and the number of days they were catered for, and the payment of the amount must be made as soon as possible.

However, neither in the case of ordinary requisitions, nor in the case of quartering of troops, is a commander compelled to pay the prices asked by the inhabitants. On the contrary, he may fix the prices himself, although it is expected that they shall be fair.

§ 148. Contribution is a payment in ready money demanded either from municipalities or from inhabitants, whether enemy subjects or foreign residents. Whereas formerly no general rules concerning contributions existed, Articles 49 and 51 of the Hague Regulations enacted that contributions might not be demanded extortionately, but exclusively<sup>2</sup> for the needs of the army, in order, for instance to pay for requisitions, or for the administration of the locality in question. They may be imposed by a written order of a commander-in-chief only, in contradistinction to requisitions which may be imposed by a mere commander in a locality. They may not be imposed indiscriminately on the inhabitants, but must so far as possible be assessed upon them in compliance with the rules laid down by their own Government regarding the assessment of taxes. And, finally, for every individual contribution a receipt must be given. It is apparent that these rules of the Hague Regulations seek to exclude all arbitrariness and

Contributions.

Supreme Court see *ibid.*, Case No. 340, where it was held that a subsequent sale by the requisitioning State does not retroactively render the requisition void.

<sup>1</sup> See above, § 143.

<sup>2</sup> As regards contributions as a penalty see Article 50 of the Hague Regulations. See also Keller, *op. cit.*, pp. 60-62.



despotism on the part of an invading enemy with regard to contributions, and to secure to the individual contributors, as well as to contributing municipalities, the possibility of being indemnified afterwards by their own Government, thus shifting, so far as possible, the burden of supporting the war from private individuals and municipalities to the State proper.<sup>1</sup>

But the Hague Regulations relating to contributions, as well as those relating to requisitions, were violated by the Central Powers in the territories which they occupied during the World War. In Belgium and Northern France, for example, the contributions which they levied were undoubtedly excessive, for they were limited to the needs neither of the army of occupation nor of the administration of the country.<sup>2</sup>

## VIII

### DESTRUCTION OF ENEMY PROPERTY

Grotius, iii. c. 5, §§ 1-3; c. 12—Vattel, iii. §§ 166-168—Hall, § 186—Lawrence, § 206—Manning, p. 186—Twiss, ii. §§ 65-69—Halleck, ii. pp. 87, 88, 92—Taylor, §§ 481-482—Wharton, iii. § 349—Moore, vii. § 1113—Wheaton, §§ 347-351—Bluntschli, §§ 649, 651, 662, 663—Heffter, § 125—Lueder in *Holtzendorff*, iv. pp. 482-487—Klüber, § 262—G. F. Martens, ii. § 280—Ullmann, § 176—Fauchille, §§ 1084 (1), 1091—Keith's Wheaton, pp. 756-761—Pradier-Fodéré, vi. Nos. 2770-2774—Rivier, ii. pp. 265-268—Nys, iii. pp. 160-164—Calvo, iv. §§ 2215-2222—Fiore, iii. Nos. 1383-1388, and *Code*, Nos. 1530-1534, 1610-1611—Martens, ii. § 110—Longuet, §§ 99, 100—Rolin, §§ 347-354—Hyde, ii. § 657—Garner, i. §§ 206-213—*Kriegsbrauch*, pp. 53-56—Holland, *War*, Nos. 3 and 76 (g)—Bordwell, p. 284—Spaight, *Land*, pp. 111-140—Spaight, *Air*, pp. 239-259—*Land Warfare*, §§ 414, 422, 426, 427, 434.

Wanton  
Destruction  
prohibited.

§ 149. In former times invading armies frequently used to fire and destroy all enemy property they could not make use of or carry away. Afterwards, when the practice of warfare grew milder, belligerents in strict law retained the

<sup>1</sup> It is strange to observe that *Kriegsbrauch*, pp. 61-63, does not mention the Hague Regulations at all.

<sup>2</sup> See details in Garner, ii. §§ 388-389. By the Treaty of Versailles

(Article 244, Annex 1), Germany was made liable to pay compensation for damage 'in the form of levies, fines, and other similar exactions . . . upon the civilian population.'

right to destroy enemy property according to discretion, although they did not, as a rule, any longer make use of such right. Nowadays, however, this right is obsolete. For in the nineteenth century it became a universally recognised rule of International Law that all useless and wanton destruction of enemy property, be it public or private, was absolutely prohibited; and this rule was expressly enacted by Article 23 (g) of the Hague Regulations: 'to destroy . . . enemy's property, unless such destruction . . . be imperatively demanded by the necessities of war, is prohibited.'

§ 150. All destruction of, and damage to, enemy property for the purpose of offence and defence is *necessary* destruction and damage, and therefore lawful, whether it be on the battlefield during battle, or in preparation for battle or siege. To strengthen a defensive position, a house may be destroyed or damaged. To cover the retreat of an army, a village on the battlefield may be fired. The district around a fortress held by an enemy may be razed, and, therefore, all private and public buildings, all vegetation may be destroyed, and all bridges blown up within a certain area. If a farm, a village, or even a town is not to be abandoned, but prepared for defence, it may be necessary to damage in many ways, or entirely destroy, private and public property. Further, if and where a bombardment is lawful, all destruction of property involved in it becomes likewise lawful. When a belligerent force obtains possession of an enemy factory which makes ammunition or supplies provisions for the enemy troops, if it is not certain that it can hold it against an attack, it may at least destroy the plant, if not the buildings. Or if a force occupies an enemy fortress, it may raze the fortifications. Even a force entrenching itself on a battlefield may be obliged to resort to the destruction of many kinds of property.

Destruction for the Purpose of Offence and Defence.

Be that as it may, in every case destruction must be '*imperatively* demanded by the necessities of war,' and must not merely be the outcome of a spirit of plunder or revenge such as, during the World War, prompted the dreadful and utter devastation <sup>1</sup> of houses, orchards, vineyards, trees in

<sup>1</sup> See Garner, i. § 206.

the area from which the German armies in France withdrew in the spring of 1917, and of the coal-mines, factories, and dwellings in Cambrai and elsewhere which marked the German line of retreat in the autumn of the following year.<sup>1</sup>

Destruction in Marching, Reconnoitring, and Conducting Transport.

§ 151. Destruction of enemy property in marching troops, conducting military transport, and in reconnoitring, is lawful if unavoidable. A reconnoitring party need not keep on the road if they can better serve their purpose by riding across the tilled fields. And troops may be marched, and transport may be conducted, over crops when necessary. A humane commander will not unnecessarily allow his troops and transport to march and ride over tilled fields and crops. But if the purpose of war necessitates it, he is justified in so doing.

Destruction of Arms, Ammunition, and Provisions.

§ 152. Whatever enemy property a belligerent may appropriate he may likewise destroy. To prevent the enemy from making use of them, a retreating force may destroy arms, ammunition, provisions, and the like, which they have taken from the enemy, or requisitioned, and cannot carry away. But they may not destroy provisions in the possession of private enemy inhabitants in order to prevent the enemy from making use of them in the future.<sup>2</sup> Nor is a commander allowed to requisition such provisions in order to have them destroyed, for Article 52 of the Hague Regulations expressly enacts that requisitions are only admissible for the necessities of the army.

Destruction of Historical Monuments, Works of Art, and the like.

§ 153. All destruction of, and damage to, historical monuments, works of art and science, buildings for charitable, educational, and religious<sup>3</sup> purposes are specially prohibited by Article 56 of the Hague Regulations, which enacts that the perpetrators of such acts must be prosecuted (*poursuivis*), i.e. court-martialled. But these objects enjoy this protection only during military occupation of enemy

<sup>1</sup> See Garner, i. § 211. See also below, § 154.

<sup>2</sup> Spaight, *Land*, p. 138, objects to this statement. His arguments are not conclusive, because they concern the case of justified general devastation.

<sup>3</sup> According to Grotius (iii. c. 5,

§§ 2 and 3), destruction of graves, tombstones, churches, and the like is not prohibited by the Law of Nations, although he strongly advises (iii. c. 12, §§ 5-7) that they should be spared, unless their preservation is dangerous to the interests of the invader.

territory. Should a battle be waged around an historical monument on open ground, should a church, a school, or a museum be defended and attacked during military operations, these otherwise protected objects may be damaged or destroyed under the same conditions as other enemy property.<sup>1</sup>

§ 154. The question must also be considered whether, and under what conditions, general devastation of a locality, be it a town or a larger part of enemy territory, is permitted. There cannot be the slightest doubt that such devastation is, as a rule, absolutely prohibited, and only in exceptional cases permitted when, to use the words of Article 23 (g) of the Hague Regulations, it is 'imperatively demanded by the necessities of war.' It is impossible to define once for all the circumstances which make a general devastation necessary, since everything depends upon the merits of the special case. But the fact that a general devastation can be lawful must be admitted. It is, for instance, lawful in case of a levy *en masse* on already occupied territory, when self-preservation obliges a belligerent to resort to the most severe measures. It is also lawful when, after the defeat of his main forces and occupation of his territory, an enemy disperses his remaining forces into small bands which carry on guerilla tactics and receive food and information, so that there is no hope of ending the war except by a general devastation which cuts off supplies of every kind from the guerilla bands. But it must be specially observed that general devastation is only justified by imperative necessity, and by the fact that there is no better and less severe way open to a belligerent.<sup>2</sup> There was, for example, no imperative necessity to justify the general devastation by the German armies of the Somme area of France in the spring of 1917, during the World War, or of the country through which they were rolled back in the following autumn.<sup>3</sup>

<sup>1</sup> See further below, § 158.

<sup>2</sup> See Hall, § 186, who gives *in nuce* a good survey of the doctrine and practice of general devastation from Grotius down to the beginning of the nineteenth century. See also Spaight, *Land*, pp. 125-139.

<sup>3</sup> See Fauchille, *L'évacuation des territoires occupés par l'Allemagne dans le Nord de la France* (1917); and in *R.G.*, xxiv. (1917) pp. 317-336, and Garner, i. §§ 206-213. See also above, § 150.

Be that as it may, whenever a belligerent resorts to general devastation, he ought, if possible, to make some provision for the unfortunate peaceful population of the devastated tract of territory. It would be more humane to take them away into captivity rather than let them perish on the spot. The practice, resorted to during the South African War, of housing the victims of devastation in concentration camps, must be approved. The purpose of war may even oblige a belligerent to confine a population forcibly<sup>1</sup> in concentration camps.

## IX

### ASSAULT, SIEGE, AND BOMBARDMENT

Vattel, iii. §§ 169-170—Hall, § 186—Lawrence, § 204—Westlake, ii. pp. 87-89—Moore, vii. § 1112—Halleck, ii. pp. 74, 82, 213—Hershey, No. 382—Taylor, §§ 483-485—Bluntschli, §§ 552-554b—Heffter, § 125—Lueder in *Holtzendorff*, iv. pp. 448-457—G. F. Martens, ii. §§ 286-287—Ullmann, § 181—Fauchille, §§ 1093-1099 (1)—Despagnet, Nos. 528-535—Pradier-Fodéré, vi. Nos. 2779-2786—Rivier, ii. pp. 284-288—Nys, iii. pp. 148-160—Calvo, iv. §§ 2067-2095—Fiore, iii. Nos. 1322-1330, and *Code*, Nos. 1524-1529—Longuet, §§ 58-59—Mérignhac, iii<sup>a</sup>. pp. 270-284—Suarez, §§ 365a, 365b—Hatschek, p. 19—Keith's Wheaton, pp. 761-764—Gemma, pp. 309-315—Rolin, §§ 365-378—Mérignhac-Lémonon, i. pp. 194-228—Hyde, ii. §§ 655-656—Pillet, pp. 101-112—Zorn, pp. 161-174—Holland, *War*, Nos. 80-83—Bordwell, pp. 286-288—Meurer, §§ 32-34—Spaight, *Land*, pp. 157-201—Garner, i. §§ 269-272—*Kriegsbrauch*, pp. 18-22—*Land Warfare*, §§ 117-138—Rolin-Jaequemyns in *R.I.*, ii. (1870) pp. 659, 674, iii. (1871) pp. 297-307—Fauchille in *R.G.*, xxiv. (1917) pp. 56-74.

Assault,  
Siege, and  
Bombard-  
ment,  
when  
lawful.

§ 155. Assault, siege, and bombardment are in themselves, severally and jointly, perfectly legitimate means of warfare.<sup>2</sup> Neither bombardment nor assault *on* the battlefield needs special discussion, as they are allowed under the same circumstances and conditions as force in general. The only question here is under what circumstances assault and

<sup>1</sup> See above, § 116 (n.), and Hyde, ii. § 658. As regards devastation during the South African War, and the concentration camps instituted in consequence, see Beak, *The Aftermath of War* (1906), pp. 1-30; *The Times*, *History of the War in South Africa*, v. pp. 252-254; Spaight, *Land*, pp. 306-310.

<sup>2</sup> The assertion of some writers—see, for instance, Pillet, pp. 104-107, and Mérignhac, iii<sup>a</sup>. p. 273—that bombardment is lawful only after an unsuccessful attempt by the besiegers to starve the besieged into surrender is not based upon a recognised rule of the Law of Nations.

bombardment are allowed *outside* the battlefield. The answer is indirectly given by Article 25 of the Hague Regulations, where it is categorically enacted that 'the attack or bombardment, by any means whatever, of towns, villages, habitations, or buildings, which are not defended, is prohibited.'<sup>1</sup> This provision involved a decided advance in the view taken by International Law, for it was formerly asserted by many writers<sup>2</sup> and military experts that, for certain reasons and purposes, undefended localities also might, in exceptional cases, be bombarded; but it is doubtful how far the practice of the World War came up to the new standard.<sup>3</sup> It matters not, however, whether the defended locality be fortified or not, since an unfortified place can be defended; but under what circumstances a place is to be regarded as defended is not always free from doubt.<sup>4</sup> Nothing prevents a belligerent who has taken possession of an undefended fortified place from destroying the fortifications by bombardment as well as by other means.

The words 'by any means whatever' were added by the Second Hague Conference so as to cover bombardment by aircraft. Nevertheless, it is maintained by some that, by analogy with bombardment by naval forces,<sup>5</sup> railway junctions, munition factories, and the like may be bombarded from the air though situated in undefended places. The question of law is controversial.<sup>6</sup> All belligerents resorted to such bombardments during the World War.

§ 156. Undefended towns, villages, habitations, or buildings may not be assaulted<sup>7</sup>; but when assault is lawful, no special rules of International Law exist with regard to the mode of carrying it out. Therefore, only the general

<sup>1</sup> Siege is not here specially mentioned, both because no belligerent would dream of besieging an undefended locality, and because it would involve unjustifiable violence against enemy persons, and would, therefore, be unlawful.

<sup>2</sup> See, for instance, Lueder in *Holtzendorff*, iv. p. 451.

<sup>3</sup> For details of the many charges of bombarding undefended places which the belligerents made against each other see Garner, i. §§ 269-270.

<sup>4</sup> See Holla, *The Peace Conference at The Hague* (1900), p. 152. According to *Land Warfare*, § 199, a locality 'may be deemed to be defended, if a military force is in occupation of, or marching through it.' See Spaight, *Air*, p. 197, on the inadequacy of the 'defence' test.

<sup>5</sup> See below, § 213.

<sup>6</sup> See below, §§ 214a, 214e; and Spaight in *B.Y.*, 1923-1924, pp. 21-33, and Spaight, *Air*, pp. 195-211.

<sup>7</sup> See above, § 155.

rules respecting offence and defence apply. It is in particular not<sup>1</sup> necessary to give notice of an impending assault to the authorities of the locality, or to request them to surrender before an assault is made. That an assault may, or may not, be preceded, or accompanied, by a bombardment, need hardly be mentioned; nor that, by Article 28 of the Hague Regulations, pillage of towns taken by assault is expressly prohibited.

Siege,  
how  
carried  
out.

§ 157. With regard to the mode of carrying out siege *without bombardment*, no special rules of International Law exist, and here too only the general rules respecting offence and defence apply. Therefore, an armed force besieging a town may, for instance, cut off the river which supplies drinking water to the besieged, but must not poison<sup>2</sup> the river. Moreover, no rule of law exists which obliges a besieging force to allow all non-combatants, or even women, children, the aged, the sick and wounded, or subjects of neutral Powers, to leave the besieged locality unmolested.<sup>3</sup> Further, should the commander of a besieged place expel the non-combatants, in order to lessen the number of those who consume his store of provisions, the besieging force need not allow them to pass through its lines, but may drive them back.<sup>4</sup>

Bombard-  
ment, how  
carried  
out.

§ 158. Bombardment by land forces was not generally considered prior to the World War except in connection

<sup>1</sup> This may be inferred from Article 26 of the Hague Regulations.

<sup>2</sup> See above, § 110.

<sup>3</sup> Such permission is sometimes granted. Thus in 1870, during the Franco-German War, the German besiegers of Strasbourg as well as of Belfort allowed the women, the children, and the sick to leave the besieged fortresses.

<sup>4</sup> See *Land Warfare*, § 129.

That diplomatic envoys of neutral Powers may not be prevented from leaving a besieged town is a consequence of their extraterritoriality. However, if they voluntarily remain, may they claim uncontrolled communication with their home State by correspondence and couriers? When Mr. Washburne, the American diplomatic envoy at Paris during the

siege of that city in 1870 by the Germans, claimed the right of sending through the German lines a messenger with despatches to London in a sealed bag, Bismarck declared that he was ready to allow foreign diplomats in Paris to send a courier to their home States once a week, but only if their despatches were open and did not contain any remarks concerning the war. Although the United States and other Powers protested, Bismarck did not alter his decision. The whole question must be treated as open: see Rolin-Jaequemyns in *R.I.*, iii. (1871) pp. 371-377; and above, vol. i. § 399, and Wharton, i. § 97. As to the position of neutral consuls in the sphere of military operations see Rousseau in *R.G.*, xl. (1933) pp. 517-519.

with assault or siege. But the experiences of that war, and in particular the new uses of aircraft<sup>1</sup> and long-range guns, have raised the question<sup>2</sup> how far bombardment is lawful when it is solely for destructive purposes, and is not intended to be a prelude to occupation by armed forces. If, as is generally held, bombardment by aircraft within the theatre of operations is lawful, even though there is no intention to occupy the bombarded area, similar bombardment by long-range guns would appear to be legitimate.<sup>3</sup> However this may be, Article 26 of the Hague Regulations enacts that the commander of the attacking forces, except in the case of an assault, shall do all he can to notify his intention to resort to bombardment. But it must be emphasised that a strict duty of notification in all cases of bombardment is not thereby imposed, for a commander only has to *do all he can* to send notification. He cannot do it when the circumstances of the case prevent him, or when the necessities of war demand an immediate bombardment. The purpose of notification is to enable private individuals within the locality to be bombarded to seek shelter for their persons and for their valuable personal property.

Article 27 of the Hague Regulations enacts the former customary rule that all necessary steps must be taken to spare, as far as possible, all buildings devoted to religion, art, science, and charity, and historic monuments,<sup>4</sup> hospitals, and all other places where the sick and wounded are collected, provided these buildings, places, and monuments are not used at the same time for military purposes. To enable the attacking forces to spare them, they must be indicated by some signs, which must be previously notified to the attacking forces, and must be visible from the far distance

<sup>1</sup> As to aerial warfare see below, §§ 214a-214e; Spaight, *Air*, pp. 195-271; the same, *Air Power and the Cities* (1930), *passim*; and Sloutzki in *R.I.* (Geneva), 1924, pp. 48-60 and 151-169. See also the case of *Coenca Brothers v. Germany*, decided in 1927 by the Greco-German Mixed Arbitral Tribunal, in which it was held that the obligation of Article 26 of the Hague Regulations (see below) applied by analogy to bombardment from the

air: *Annual Digest*, 1927-1928, Case No. 389.

<sup>2</sup> See Fauchille in *R.G.*, xxiv. (1917) pp. 56-76.

<sup>3</sup> This expression of opinion has been put together from a rough note by the author, and he evidently intended to reconsider it.

<sup>4</sup> See Zitelmann in *Z.V.*, x. (1917) pp. 1-19, Clemen, *Kunstschutz im Kriege* (1919), and Ch. de Visscher in *R.I.*, 3rd ser., xvi. (1935) pp. 256-270.



from which the besieging artillery carries out the bombardment.

No bombardment takes place without the sufferers accusing the attacking forces of neglecting the rule that such places must be spared. In practice, whenever one belligerent accuses another of having intentionally bombarded a hospital, church, or similar building, the charge is always either denied with indignation or justified by the assertion that these sacred buildings have been used improperly by the accuser.<sup>1</sup> However this may be, no legal duty compels the attacking forces to restrict bombardment to fortifications only. On the contrary, destruction of private and public buildings through bombardment has always been, and is still, considered lawful, as it is one of the means of impressing upon the authorities the advisability of surrender. Some writers<sup>2</sup> assert that bombardment of a town, in contradistinction to its fortifications, is never lawful, or, at any rate, is lawful only when bombardment of the fortifications has not induced surrender. But this opinion does not represent the actual practice of belligerents, and the Hague Regulations did not adopt it.

## X

### ESPIONAGE AND WAR TREASON

Grotius, iii. c. 4, § 18, No. 3—Vattel, iii. §§ 179-182—Hall, § 188—Westlake, ii. pp. 89-91—Lawrence, § 199—Phillimore, iii. § 96—Halleck, i. pp. 627-631, and in *A.J.*, v. (1911) pp. 590-603—Taylor, §§ 490, 492—Wharton, iii. § 347—Moore, vii. § 1132—Hershey, No. 383—Bluntschli, §§ 563-564, 628-640—Heffter, § 125—Lueder in *Holtzendorff*, iv. pp. 461-467—Ullmann,

<sup>1</sup> Thus when France in 1870 complained that the Germans, during the siege of Paris, had deliberately bombarded the hospitals, the Germans asserted that it was an accident. Further, in 1870, during the siege of Strasbourg, when the Germans bombarded the cathedral, they justified their action by asserting that the French had established an observation post thereon. Again, in the World War, when the Germans shelled and destroyed the cathedral of Rheims and other sacrosanct

edifices, they again pleaded in justification that observation posts had been established thereon. For details regarding bombardment of places enumerated in Article 27 during the World War see Garner, i. §§ 285-289, and Spaight, *Air*, pp. 260-271.

<sup>2</sup> See, for instance, Pillet, pp. 104-107; Bluntschli, § 554a; Mérygnac, iii<sup>e</sup>, pp. 280-284. Vattel (iii. § 169) does not deny the right to bombard the town, although he does not recommend it.

§ 176—Fauchille, §§ 1100 (1)-1104 (2)—Despagnet, Nos. 536-542—Pradier-Fodéré, vi. Nos. 2762-2768—Rivier, ii. pp. 282-284—Nys, iii. pp. 209-218—Calvo, iv. §§ 2111-2122—Fiore, iii. Nos. 1341, 1374-1376, and *Code*, Nos. 1492-1497—Martens, ii. § 116—Longuet, §§ 63-75—Mérignhac, iii<sup>a</sup>. pp. 285-299—Rolin, §§ 381-399—Hyde, ii. §§ 677-678—Keith's *Wheaton*, pp. 764-766—Pillet, pp. 97-100—Zorn, pp. 174-195—Balladore Pallieri, pp. 244-249—Kunz, pp. 67-69—Holland, *War*, Nos. 84-87—Bordwell, pp. 291-292—Meurer, §§ 35-38—Spaight, *Land*, pp. 202-215, 333-335—Spaight, *Air*, pp. 89-91, 272-279, 283-290—Ariga, §§ 98-100—Takahashi, pp. 185-194—*Kriegsbrauch*, pp. 30-31—*Land Warfare*, §§ 155-173—Friedemann, *Die Rechtslage der Kriegskundschafter und Kriegsspione* (1892)—Detourbet, *L'espionnage et la trahison* (1898)—Violle, *L'espionnage militaire en temps de guerre* (1904)—Adler, *Die Spionage* (1906)—Routier, *L'espionnage et la trahison en temps de paix et en temps de guerre* (1915)—Hirt, *Du délit d'espionnage* (1937), especially pp. 263-275—Bentwich in the *Journal of the Society of Comparative Legislation*, New Ser., x. (1910) pp. 243-249—McKinney in the *Illinois Law Review*, xii. (1918) pp. 591-628.

§ 159. War cannot be waged without all kinds of information about the forces and the intentions of the enemy, and about the character of the country within the zone of military operations. To obtain the necessary information, it has always been considered lawful to employ spies, and also to make use of the treason of enemy soldiers or private enemy subjects, whether they were bribed,<sup>1</sup> or offered the information voluntarily and gratuitously. Article 24 of the Hague Regulations enacted the old customary rule that the employment of methods necessary to obtain information about the enemy and the country is considered allowable. The fact, however, that these methods are lawful on the part of the belligerent who employs them does not protect from punishment such individuals as are engaged in procuring information. Although a belligerent acts lawfully in employing spies and traitors, the other belligerent, who punishes them, likewise acts lawfully. Indeed, espionage and war treason bear a twofold character. For persons committing acts of espionage or war treason are—as will be shown below<sup>2</sup>—considered war criminals and may be punished, but the employment of spies and traitors is considered lawful on the part of belligerents.

Twofold Character of Espionage and War Treason.

Espionage in contradistinction to Scouting and Despatch-bearing.

§ 160. Espionage must not be confused, firstly, with scouting, or secondly, with despatch-bearing. According to

<sup>1</sup> Some writers maintain, however, that it is not lawful to bribe enemy soldiers into espionage; see below, § 162.

<sup>2</sup> § 255.

Article 29 of the Hague Regulations, espionage is the act of a soldier or other individual who clandestinely, or under false pretences, seeks to obtain information concerning one belligerent in the zone of belligerent operations with the intention of communicating it to the other belligerent.<sup>1</sup> Therefore, soldiers not in disguise, who penetrate into the zone of operations of the enemy, are not spies.<sup>2</sup> They are scouts who enjoy all the privileges of members of armed forces, and they must, if captured, be treated as prisoners of war. Likewise, soldiers or civilians charged with the delivery of despatches for their own army or for that of the enemy, and carrying out their mission openly, are not spies. And it matters not whether despatch-bearers make use of balloons, aircraft, or other means of communication.<sup>3</sup> Thus, a soldier or civilian trying to carry despatches from a force besieged in a fortress to other forces of the same belligerent, whether making use of a balloon, or an air-vessel, or riding or walking at night, may not be treated as a spy. On the other hand, spying can well be carried out by despatch-bearers, or by persons in a balloon or an air-vessel.<sup>4</sup> The mere fact that a balloon or air-vessel is visible does not protect the persons using it from being treated as spies; since spying can be carried out under false pretences quite as well as clandestinely. But special care must be taken to really prove the fact of espionage in such cases, for an individual carrying despatches is *prima facie* not a spy, and must not be treated as a spy until proved to be such.<sup>5</sup>

<sup>1</sup> For an interpretation of the phrase 'in the zone of belligerent operations' see *United States v. McDonald*, 265 Fed. 754; *Annual Digest*, 1919-1922, Case No. 298, where the Court held that the conditions of the World War brought the port of New York within the field of operations. Assisting or favouring espionage, and knowingly concealing a spy, are, according to a customary rule of International Law, acts punishable as though they were themselves acts of espionage; see *Land Warfare*, § 172.

<sup>2</sup> On the status of agents landed by aircraft in enemy territory for the purpose of obtaining information,

causing destruction, etc., see Spaight, *Air*, pp. 272-290, and Liszt, § 58, B (4).

<sup>3</sup> As to aircraft and espionage see Spaight, *Air*, pp. 89-91, 272-279, 283-290.

<sup>4</sup> See below, § 356 (4), concerning wireless telegraphy.

<sup>5</sup> A remarkable case of conviction for espionage is that of Major André (see Halleck in *A.J.*, v. (1911) p. 594), which occurred in 1780 during the American War of Independence. The American General Arnold, who was commandant of West Point, on the North River, intended to desert the Americans and join the British forces. He opened negotiations with

§ 161. The usual punishment for spying is hanging or shooting; though less severe punishments are, of course, admissible, and are sometimes inflicted. However, according to Article 30 of the Hague Regulations, a spy may not be punished without trial before a court-martial; and according to Article 31, a spy who is not captured in the act, but rejoins the army to which he belongs and is subsequently captured by the enemy, may not be punished for his previous espionage, but must be treated as a prisoner of war. But Article 31 applies only to spies who belong to the armed forces of the enemy; civilians who act as spies, and are captured later, may be punished. No regard is paid to the status, rank, position, or motive of a spy. He may be a soldier or a civilian, an officer or a private. He may be following instructions of superiors, or acting on his own initiative from patriotic motives.<sup>1</sup>

§ 162. War treason is a comprehensive term for a number of acts hostile to the belligerent within whose lines they are committed<sup>2</sup>; it must be distinguished from real treason, which can only be committed by persons owing allegiance,

Punishment of Espionage.  
War Treason.

Sir Henry Clinton for the purpose of surrendering West Point, and Major André was commissioned by Sir Henry Clinton to make the final arrangements with Arnold. On the night of September 21, Arnold and André met outside the American and British lines, but André, after having changed his uniform for plain clothes, undertook to pass the American lines on his return, furnished with a passport under the name of John Anderson by General Arnold. He was caught, convicted as a spy, and hanged. As he was not seeking information—though Halleck, *loc. cit.*, p. 598, asserts the contrary—he was therefore not a spy according to Article 29 of the Hague Regulations, and a conviction for espionage would not, if such a case occurred to-day, be justified. But it would be possible to convict for war treason, for André was no doubt negotiating treason. Be that as it may, George III. considered André a martyr, and honoured his memory by granting a pension to his mother and a baronetcy to his brother. See

Phillimore, iii. § 106; Halleck, i. p. 630; Rivier, ii. p. 284; Hyde, ii. § 677 (n. 3), where Winthrop Sargent's *Life of Major André* (New York, 1871) is cited. For an instructive collection of information concerning espionage during the World War see *L'espionnage et le contre-espionnage pendant la guerre mondiale* (transl. from German, 1934).

<sup>1</sup> A case of espionage, remarkable on account of the position of the spy, is that of the American Captain Nathan Hale, which occurred in 1776. After the American forces had withdrawn from Long Island, Captain Hale recrossed under disguise, and obtained valuable information about the English forces that had occupied the island. But he was caught before he could rejoin his army, and he was executed as a spy. The case of Major Jakoga and Captain Oki, which, though reported as a case of espionage, is really a case of war treason, will be discussed below in § 225 (n.).

<sup>2</sup> The subject is more fully discussed below in § 255.

albeit temporary, to the injured State. War treason can be committed by a soldier or an ordinary subject of a belligerent, but it can also be committed by an inhabitant of occupied enemy territory, or even by a subject of a neutral State temporarily staying there, and it can take place after an arrangement with the favoured belligerent or without such an arrangement. In any case, a belligerent making use of war treason acts lawfully, although the Hague Regulations do not mention the matter at all.

This is generally recognised; but it is controversial<sup>1</sup> whether a belligerent acts lawfully who bribes a commander of an enemy fortress into surrender, or incites enemy soldiers to desertion, or bribes enemy officers for the purpose of getting important information, or does other acts of this nature. If the rules of the Law of Nations are formulated, not from doctrines of book-writers, but from what is done by belligerents in practice,<sup>2</sup> it must be asserted that such acts are not considered illegal according to the existing rules of the Law of Nations.

Incite-  
ment of  
Enemy  
Subjects  
to  
Rebellion.

§ 162a. The legitimacy, formerly controversial,<sup>3</sup> of inciting enemy subjects to rise against the Government in power is now no longer disputed. During the World War the belligerents displayed vigorous activity in that direction.<sup>4</sup> Since then, the increased possibility of disseminating propaganda by aircraft and, above all, the advent of broadcasting, have revealed the wide potentialities of this weapon. While, in the war which broke out in 1939, both sides<sup>5</sup>

<sup>1</sup> See Vattel, iii. § 180; Heffter, § 125; Taylor, § 490; Martens, ii. § 110 (8); Longuet, § 52; Mérignhac, iii. p. 289; Westlake, ii. p. 83; Hyde, ii. § 665. See also below, § 164.

<sup>2</sup> See *Land Warfare*, § 158.

<sup>3</sup> See, e.g., Pillet, p. 99; Martens, ii. p. 209; Despagnet, § 526; Mérignhac, iii. p. 150; Spaight, *Land*, pp. 146-150, who distinguishes between the incitement of troops, which he regards as permissible, and the incitement of the civilian population; but see, for a different view, the same author's *Air*, pp. 308-310; Hyde, ii. § 526. See also Baty in *Yale Law Journal*,

xxxvi. (1926-1927) pp. 977-984, on fomenting of revolt by the occupying Power. By an Order in Council issued on October 3, 1939, under the Emergency Powers Act, alien enemies in Great Britain were permitted to hold commissions or enlist in the armed forces of the Crown.

<sup>4</sup> See Spaight, *Air*, pp. 291-310, on propaganda by aircraft, and Fauchille, No. 1088 (1).

<sup>5</sup> Germany, somewhat inconsistently, enacted heavy penalties, not excluding the death penalty, for listening to foreign broadcasts or communicating their contents.

established regular wireless services for spreading war news among both the enemy and the neutrals, the Allies resorted on a large scale to propaganda disseminated from aircraft as a means of inducing the population of Germany to remove a dictatorial régime which, it was asserted, was solely responsible for the war. Although this type of persuasion runs the danger of relying to an undue extent on the view that the population of a country can in the long run be relieved of the responsibility for the acts of its government,<sup>1</sup> no considerations of law stand in the way of the employment of this means of breaking the resistance of the enemy. If the total annihilation of the enemy as an independent State is a legitimate aim of the war, there can be no objection of a legal nature to activities calculated to achieve the object of the war by a revolutionary overthrow of the enemy government. Such acts are legitimate on the part both of the belligerent government and of the individuals charged with their execution. During the World War the Central Powers occasionally asserted the right to punish for high treason individual members of the armed forces of the enemy who dropped seditious leaflets from the air.<sup>2</sup> No such right is conferred by International Law.

## XI

### RUSES

Grotius, iii. c. 1, §§ 6-18—Bynkershoek, *Quaestiones Juris publici*, i. c. 1—Vattel, iii. §§ 177-178—Hall, § 187—Lawrence, § 207—Westlake, ii. pp. 79-81—Phillimore, iii. § 94—Halleck, i. pp. 622-627—Taylor, § 488—Moore, vii. § 1115—Bluntschli, §§ 565-566—Heffter, § 125—Lueder in *Holtzendorff*, iv. pp. 457-461—Ullmann, § 176—Fauchille, §§ 1085-1089—Despagnet, Nos. 526-527—Pradier-Fodéré, vi. Nos. 2759-2761—Rivier,

<sup>1</sup> 'The men who form a state are not allowed to disclaim their part in the offences alleged against it. . . . And this is just. Whatever is done or committed by a state is done or committed by the men who are grouped in it, or at least the deed or the commission is sanctioned by them. The state is not a self-acting machine': Westlake, *Collected Papers*, p. 269.

<sup>2</sup> See Spaight, *Air*, pp. 304-306. Article 21 of the Hague Rules (see below, p. 409) provides as follows: 'The use of aircraft for the purpose of disseminating propaganda shall not be treated as an illegitimate means of warfare. Members of the crews of such aircraft must not be deprived of their rights as prisoners of war on the charge that they have committed such an act.'

ii. p. 261—Nys, iii. pp. 204-209—Calvo, iv. §§ 2106-2110—Fiore, iii. Nos. 1334-1339—Longuet, §§ 53-56—Mérignhac, iii<sup>a</sup>. pp. 263-266—Rolin, §§ 346, 363, 364—Mérignhac-Lémonon, i. pp. 173-176—Hatschek, pp. 317-318—Hyde, ii. § 659—Pillet, pp. 93-97—*Kriegsbrauch*, pp. 23-24—Holland, *War*, Nos. 78-79—Bordwell, pp. 283, 286—Meurer, ii. pp. 151-152—Spaight, *Land*, pp. 152-156—Spaight, *Air*, pp. 145-160—*Land Warfare*, §§ 139-154—Schoedensack, *Der Flaggenmissbrauch im Landkriege* (1938)—Brocher in *R.I.*, v. (1873) pp. 325-329—Grabau in *Z.V.*, xx. (1936) pp. 257-276.

Character  
of Ruses  
of War.

§ 163. Ruses of war, or stratagems, are deceit employed in the interest of military operations for the purpose of misleading the enemy. Such deceit is of great importance in war, and, just as belligerents are allowed to employ all methods of obtaining information, so are they—and Article 24 of the Hague Regulations confirms this—allowed to employ all sorts of ruses for the purpose of deceiving the enemy. Very important objects can be attained through ruses of war, such as, for instance, the surrender of a force, or of a fortress, the evacuation of territory held by the enemy, the withdrawal from a siege, the abandonment of an intended attack, and the like. But ruses of war are also employed, and are very often the decisive factor, during battles.

Different  
Kinds of  
Strata-  
gems.

§ 164. Of ruses there are so many kinds that it is impossible to enumerate<sup>1</sup> and classify them. But some instances may be given. It is hardly necessary to mention the laying of ambushes and traps, the masking of military operations (by means of false marches or the erection of batteries and the like), the feigning of attacks or flights or withdrawals, the carrying out of a surprise, and other stratagems employed every day in war. But it is important to know that, when useful, feigned signals and bugle-calls may be ordered, the watchword of the enemy may be used, deceitful intelligence may be disseminated,<sup>2</sup> the signals and the bugle-calls of the enemy may be mimicked<sup>3</sup> to mislead his forces. Even such detestable acts<sup>4</sup> as bribery of enemy commanders and officials in high position, and secret seduction of enemy soldiers to desertion and of enemy subjects to insurrection,<sup>5</sup> are frequently committed, although many writers protest.

<sup>1</sup> See *Land Warfare*, § 144, where a great number of legitimate ruses are enumerated.

<sup>2</sup> See the examples quoted by Pradier-Fodéré, vi. No. 2761.

<sup>3</sup> See Pradier-Fodéré, vi. No. 2760.

<sup>4</sup> The point has been discussed above in § 162.

<sup>5</sup> See § 162 (n.).

As regards the use of the national flag, the military ensigns, and the uniforms of the enemy, theory and practice are unanimous in prohibiting such use during actual attack and defence, since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain who is friend and who is foe. But many<sup>1</sup> writers maintain that, until the actual fighting begins, belligerent forces may, by way of stratagem, make use of these means of deception. Article 23 (f) of the Hague Regulations does not prohibit their use without qualification, but only their *improper* use, thus leaving the question open,<sup>2</sup> what uses are proper and what are not. Those who have hitherto taught the admissibility of the use of these symbols outside actual fighting can correctly maintain that this article does not prohibit it.<sup>3</sup>

§ 165. Stratagems must be carefully distinguished from perfidy, since the former are allowed, whereas the latter is prohibited. Halleck<sup>4</sup> correctly formulates the distinction, by laying down the principle that, whenever a belligerent has expressly or tacitly engaged, and is therefore bound by a moral obligation, to speak the truth to an enemy, it is perfidy to betray his confidence, because it constitutes a breach of good faith.<sup>5</sup> Thus a flag of truce, or the cross of

Stratagems in  
contradistinction to  
Perfidy.

<sup>1</sup> See, for instance, Hall, § 187; Bluntschli, § 565; Taylor, § 488; Calvo, iv. No. 2106; Pillet, p. 95; Longuet, § 54. But the number of writers who considered it illegal to make use of the enemy flag, ensigns, and uniforms, even before an actual attack, was before the World War becoming larger; see, for instance, Lueder in *Holtzendorff*, iv. p. 458; Mérygnac, iii<sup>a</sup>. p. 264; Pradier-Fodéré, vi. No. 2760; Bonfils, No. 1074 (see now Fauchille, § 1087); *Kriegsbrauch*, p. 24; Spaight, *Land*, pp. 104-110. As regards the use of the enemy flag by men-of-war see below, § 211. On abuse of flag in air warfare see Grabau in *Archiv für Luftrecht*, vii. (1937) pp. 74-78.

<sup>2</sup> See *Land Warfare*, § 152.

<sup>3</sup> When members of armed forces wear the uniforms of prisoners or of the enemy dead, not for deceit but through shortage of clothing—and they always will if necessary—such

distinct alterations in the uniform ought to be made as will make it apparent to which side the soldiers concerned belong (see *Land Warfare*, § 154). Moreover, if soldiers are, through lack of clothing, obliged to wear civilian greatcoats, hats, and the like, care must be taken that they wear a fixed distinctive emblem which marks them as soldiers, since otherwise they lose the privileges of members of armed forces. (See Article 1 of the Hague Regulations.) During the Russo-Japanese War each belligerent repeatedly accused the other of using Chinese clothing for members of their armed forces; their soldiers apparently were obliged through lack of proper clothing temporarily to use Chinese garments. See, however, Takahashi, pp. 174-178.

<sup>4</sup> i. p. 623. See comment by Spaight, *Air*, pp. 145-146.

<sup>5</sup> See *Land Warfare*, §§ 139-142, 146-150.



the Geneva Convention, must never be used for a stratagem; capitulations must be carried out to the letter; the feigning of surrender to lure the enemy into a trap, the assassination of enemy commanders, soldiers, or heads of States, are treacherous acts. On the other hand, stratagem may be met by stratagem, and a belligerent cannot complain of the enemy who so deceives him. If, for instance, a spy of the enemy is bribed to give deceitful intelligence to his employer, or if an officer, who is approached by the enemy and offered a bribe, accepts it feigningly but deceives the briber and leads him to disaster, no perfidy is committed.

## XII

### OCCUPATION OF ENEMY TERRITORY

Grotius, iii. c. 6, § 4—Vattel, iii. §§ 197-200—Hall, §§ 153-161—Westlake, ii. pp. 93-116—Lawrence, §§ 176-179—Maine, pp. 176-183—Halleck, ii. pp. 465-500—Taylor, §§ 568-579—Hershey, Nos. 387-400—Wharton, iii. §§ 354-355—Moore, vii. §§ 1143-1155—Bluntschli, §§ 539-551—Heffter, §§ 131-132—Lueder in *Holtzendorff*, iv. pp. 510-524—Klüber, §§ 255-256—G. F. Martens, ii. § 280—Ullmann, §§ 183-184—Fauchille, §§ 1156-1175, 1395 (63)-(65)—Despagnet, Nos. 567-578—Pradier-Fodéré, vii. Nos. 2939-2988, 3019-3028—Nys, iii. pp. 222-251 and 463-472—Rivier, ii. pp. 299-306—Calvo, iv. §§ 2166-2198—Fiore, iii. Nos. 1454-1481, and *Code*, Nos. 1540-1568—Martens, i. §§ 117-120—Longuet, §§ 115-133—Mérignhac, iii<sup>a</sup>. pp. 387-415—Hyde, ii. §§ 688-702—Liszt, § 65—Suarez, §§ 387-400—Cruchaga, §§ 859-893—Hatschek, pp. 308-314—Gemma, pp. 346-358—Balladon Pallieri, pp. 325-360—Kunz, pp. 88-103—Rolin, §§ 432-482—Mérignhac—Lémonon, i. pp. 341-404—Strupp, *Wört.*, ii. 154-165—Liszt, § 61—Pillet, pp. 237-259—Zorn, pp. 213-243—Garner, ii. §§ 365-430—*Kriegsbrauch*, pp. 45-50—Holland, *War*, Nos. 102-106, and *Lectures*, pp. 354-366—Keith's Wheaton, pp. 778-798—Bordwell, pp. 312-330—Meurer, ii. §§ 45-55—Spaight, *Land*, pp. 320-380—*Land Warfare*, §§ 340-404—Waxel, *L'armée d'invasion et la population* (1874)—Litta, *L'occupazione militare* (1881)—Löning, *Die Verwaltung des General-Gouvernements im Elsass* (1874), and in *R.I.*, iv. (1872) p. 622, v. (1873) p. 69—Bernier, *De l'occupation militaire en temps de guerre* (1884)—Corsi, *L'occupazione militare in tempo di guerra e le relazioni internazionali che ne derivano* (2nd ed., 1886)—Bray, *De l'occupation militaire en temps de guerre, etc.* (1891)—Magoon, *Law of Civil Government under Military Occupation* (2nd ed., 1906)—Lorriot, *De la nature de l'occupation de guerre* (1903)—Deherpe, *Essai sur le développement de l'occupation en droit international* (1903)—Sichel, *Die kriegserische Besetzung feindlichen Staatsgebietes* (1905)—Nowacki, *Die Eisenbahnen im Kriege* (1906), pp. 78-90—Conner, *The Development of Belligerent Occupation* (1912)—Meurer, *Die völkerrechtliche Stellung der vom*

*Feind besetzten Gebiete* (1915)—Ferrand, *Des réquisitions en matière de droit international public* (1917)—Laband, *Verwaltung Belgiens* (1916) (in Festgabe für Otto Mayer)—Hölken, *Die Okkupations-armee und das Recht im besetzten Gebiete* (1917)—Merkel, *Die kriegerische Besetzung* (Hirths Annalen) (1917)—Nys, *L'occupation de guerre* (1919)—Heymann, *Das Besetzungsrecht* (1920)—Heyland, *Die Rechtsstellung der besetzten Rheinlande* (1923), pp. 3-13—Pfeffer, *Haager Landkriegsordnung und das Invasionsgebiet* (1927)—Rolin-Jaequemyns in *R.I.*, ii. (1870) p. 666, and iii. (1871) p. 311—Stier-Somlo in *Z.V.*, viii. (1914) pp. 581-608—Cybichowski in *Z.I.*, xxvi. (1916) pp. 427-478—Oppenheim in the *Law Quarterly Review*, xxxiii. (1917) pp. 266-286 and 363-370—Visscher, *ibid.*, xxxiv. (1918) pp. 72-81—Bentwich in *B.Y.*, 1920-1921, pp. 139-148—Löning in *Z.I.*, xxviii. (1919-1920) pp. 287-305—Colby in *Columbia Law Review*, xxv. (1925) pp. 904-922, and *ibid.*, xxvi. (1926) pp. 146-170—Baty in *Yale Law Journal*, xxxvi. (1926-1927) pp. 966-984—Stauffenberg in *Z.ö.V.*, ii. (1931) pp. 86-119.

§ 166. If a belligerent succeeds in occupying the whole, Occupation as an Aim of Warfare. or even a part, of enemy territory, he has realised a very important aim of warfare. He can now not only use the resources of the enemy country for military purposes, but can also keep it for the time being as a pledge of his military success, and thereby impress upon the enemy the necessity of submitting to terms of peace. In regard to occupation, International Law respecting warfare has progressed more than in any other department. In former times, enemy territory occupied by a belligerent was in every point considered his State property, so that he could do what he liked with it and its inhabitants. He could devastate the country with fire and sword, appropriate all public and private property therein, and kill the inhabitants, or take them away into captivity, or make them take an oath of allegiance. He could, even before the war was decided, and his occupation was definitive, dispose of the territory by ceding it to a third State; an instance of this happened during the Northern War (1700-1718), when in 1715 Denmark sold the occupied Swedish territories of Bremen and Verden to Hanover. That an occupant could force the inhabitants of the occupied territory to serve in his own army, and to fight against their legitimate sovereign, was indubitable. Thus, during the Seven Years' War, Frederick II. of Prussia repeatedly made forcible levies of thousands of recruits in Saxony, which he had occupied.

During the second half of the eighteenth century things

gradually began to undergo a change. That the distinction between mere temporary military occupation of territory, and real acquisition of territory through conquest and subjugation, became more and more apparent, is shown by the fact that Vattel<sup>1</sup> drew attention to it. However, it was not till long after the Napoleonic wars that, during the nineteenth century, the consequences of this distinction were carried to their full extent by the theory and practice of International Law.<sup>2</sup> The first writer who deduced the full consequences of the distinction between mere military occupation and real acquisition of territory was Heffter in his treatise *Das europäische Völkerrecht der Gegenwart*,<sup>3</sup> which appeared in 1844; but it took the whole of the nineteenth century to develop the rules regarding occupation which are now universally recognised, and in many respects have been enacted by Articles 42-56 of the Hague Regulations.

In so far as these rules touch upon the treatment of the persons and property of the inhabitants of occupied territory, and property situated thereon, they have already been considered.<sup>4</sup> What concerns us here is the sum of the rights and duties of the occupying belligerent in relation to his political administration of the territory, and to his political authority over its inhabitants.<sup>5</sup> The principle underlying these modern rules is that, although the occupant in no wise acquires sovereignty over such territory through the mere fact of having occupied it,<sup>6</sup> he actually exercises for

<sup>1</sup> iii. § 197.

<sup>2</sup> So late as 1808, after the Russian troops had militarily occupied Finland, which was at that time a part of Sweden, Alexander I. of Russia made the inhabitants take an oath of allegiance (see Martens, *N.R.*, i. p. 9), although it was only by Article 4 of the Peace Treaty of Frederikshamm (see Martens, *N.R.*, i. p. 19) of September 17, 1809, that Sweden ceded Finland to Russia; and so late as 1814, in the case of *The Foltina* (1 Dod. 450), Sir William Scott still asserted the validity of the principle of the common law 'that a conquered country forms immediately part of the King's Dominions'; alluding to the fact that the island of Guadeloupe, taken from

the French in 1810, was, before conclusion of peace, ceded by Great Britain to Sweden by Article 5 of the Treaty of Stockholm of March 3, 1813. But it would seem that Sweden never took possession of it. At any rate, by the Treaty of London of August 13, 1814, she consented to its restitution to France, Great Britain paying her twenty-four million francs as compensation.

<sup>3</sup> § 131. <sup>4</sup> See above, §§ 107-154.

<sup>5</sup> The Hague Regulations (Articles 42-56).

<sup>6</sup> See *Ottoman Debt Arbitration, Annual Digest*, 1925-1926, Case No. 360. The same applies to territories occupied by virtue of an armistice agreement: see *Kemeny v. Yugoslav State* (Hungarian Yugoslav Mixed

the time being a military authority over it.<sup>1</sup> As he thereby prevents the legitimate sovereign from exercising his authority, and claims obedience for himself from the inhabitants, he must administer the country, not only in the interest of his own military advantage, but also, at any rate so far as possible, for the public benefit of the inhabitants. Thus the present International Law not only gives certain rights to an occupant, but also imposes certain duties upon him.<sup>2</sup>

§ 167. Since an occupant, although his power is merely military, has certain rights and duties, the first question is, when, and under what circumstances, a territory must be considered occupied.

Occupation, when effected.

Now, it is certain that mere invasion is not occupation. Invasion is the marching or riding of troops—or the flying of a military air-vessel—into enemy country. Occupation is invasion *plus* taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes

Arbitral Tribunal), *ibid.*, 1927-1928, Case No. 374; *Del Vecchio v. Connio* (Court of Appeal of Milan), *ibid.*, 1919-1922, Case No. 320; but see, having regard to the dissolution of Austria-Hungary, *Galatiolo v. Senes* (Italian Court of Cassation), *ibid.*, Case No. 319. See also Heyland in *Strupp, Wört.*, iii. pp. 315-322. For an application of the principle that occupied territory does not cease to be part of the territory of the other belligerent see *Nacum and Others v. The Government of French West Africa* (decided by the French Court of Cassation), *Annual Digest*, 1919-1922, Case No. 312; *Commune of Bácsborod Case* (decided by the Hungarian Supreme Court), *ibid.*, Case No. 316. It has even been held that the laws enacted by the lawful sovereign during the occupation are binding in the occupied territory, see *Kulturās Bāls Case* (a Latvian case), *ibid.*, Case No. 321. But Belgian courts have held that such new laws enacted by the lawful sovereign with the intention to injure the occupant are not binding upon the inhabitants as a matter of their own municipal law: see *De Nimal v. De Nimal* (a Belgian case), *ibid.*, Case No. 311. But this

exception, again, does not apply to activities of a reasonable or singular nature: see the *Kauhlen Case* (Belgian Court of Cassation), *ibid.*, Case No. 323.

<sup>1</sup> See the case *Société des Quais de Smyrna v. Greek Government*, *Annual Digest*, 1929-1930, Case No. 291, decided in 1929 by a special tribunal, on the question as to how far the occupant succeeds to certain rights of the lawful sovereign. See also *R.G.*, xxxvii. (1930) p. 335.

<sup>2</sup> The principles relating to occupation of enemy territory have in a number of cases been held applicable to territory provisionally occupied by virtue of the Treaty of Peace: see *Auditeur Militaire v. Reinhardt and Others* (Military Court of the Belgian Army of Occupation), *Annual Digest*, 1923-1924, Case No. 239, and *In re Schievens and Clemens* (the same Court), *ibid.*, Case No. 240; *Rhineland Occupation (Jurisdiction) Case* (German *Reichsgericht*), *ibid.*, 1919-1922, Case No. 335. As to occupation by virtue of an armistice agreement see *Ferrari in Rivista*, xix. (1927) pp. 460-496. And, generally, on occupation by force of foreign territory in time of peace see Cavaglieri, *ibid.*, pp. 317-353.

apparent by the fact that an occupant sets up some kind of administration, whereas the mere invader does not. A small belligerent force can raid enemy territory without establishing any administration, quickly rush on to some place in the interior for the purpose of reconnoitring, destroying a bridge or depot of munitions and provisions, and the like, and quickly withdraw after having realised its purpose.<sup>1</sup>

However this may be, as a rule occupation will be coincident with invasion. The troops march into a district, and the moment they get into a village or town—unless they are actually fighting their way—they take possession of the municipal offices, the post office, the police stations, and the like, and assert their authority there. From the military point of view, such villages and towns are then ‘occupied.’ Article 42 of the Hague Regulations enacts that territory is considered occupied when it is actually placed under the authority of the hostile army, and that such occupation applies only to the territory where that authority is established, and in a position to assert itself.<sup>2</sup> This definition is not at all precise, but it is as precise as a legal definition of a fact such as occupation can be. When the legitimate sovereign is prevented from exercising his powers, and the occupant, being able to assert his authority, actually establishes an administration over a territory, it matters not with what means, and in what ways, his authority is exercised. For instance, when in the centre of a territory a large force is established, from which flying columns are constantly sent round the territory, it is indeed effectively occupied, provided that there are no enemy forces present, and these columns can really keep it under control.<sup>3</sup> The conditions vary with those of the country concerned. When a vast country is thinly populated, a smaller force is necessary to occupy it, and a smaller

<sup>1</sup> See *Land Warfare*, § 343.

<sup>2</sup> As to the relation of air forces to occupation see Spaight, *Air*, pp. 367-371.

<sup>3</sup> This is not so-called *constructive* occupation, but is really *effective* occupation. An occupation is *constructive* only if an invader declares

districts as occupied over which he does not actually exercise control—for instance, when he actually occupies only the capital of a large province, yet proclaims that he has thereby occupied the whole of the province, although he does not take any steps to exercise control over it.

number of centres need be garrisoned, than in the case of a thickly populated country.<sup>1</sup>

§ 168. Occupation comes to an end when an occupant withdraws from a territory, or is driven out of it. Thus, occupation remains only over a limited area of a territory if the forces in occupation are drawn into a fortress on that territory, and are there besieged by the returning enemy, or if the occupant concentrates his forces in a certain place on the territory, withdrawing before the returning enemy. But occupation does not cease because the occupant, after having disarmed the inhabitants, and having made arrangements for the administration of the country, is marching on to overtake the retreating enemy, leaving only comparatively few soldiers behind.

§ 169. As the occupant actually exercises authority, and as the legitimate Government is prevented from exercising its authority,<sup>2</sup> the occupant acquires a temporary right of

Occupation, when ended.

Rights and Duties in general of the Occupant.

<sup>1</sup> Thus, the occupation of the former Orange Free State and the former South African Republic became effective in 1901 some time after their annexation by Great Britain and the degeneration of ordinary war into guerilla war, although only about 250,000 British soldiers had to keep up the occupation of a territory of about 500,000 square miles. The facts that all the towns and all the lines of communication were in the hands, and under the administration, of the British army, that the inhabitants of smaller places were taken away into concentration camps, that the enemy forces were either in captivity or dispersed into comparatively small guerilla bands, and, finally, that wherever such bands tried to make an attack a sufficient British force could within reasonable time make its appearance, were quite sufficient to assert British authority over that vast territory, although it was more than a year before peace was finally established.

It may well be doubted whether, when these territories were annexed (see above, vol. i. § 239), their occupation could be called effective. The British Government ought not, therefore, to have proclaimed their annexation

at such early dates. But there ought to be no doubt that the occupation became effective some time afterwards, in 1901. See, however, Sir Thomas Barclay in the *Law Quarterly Review*, xxi. (1905) p. 307, who asserts the contrary; see also below, §§ 264, 265. 'The Times' *History of the War in South Africa* (v. p. 251) estimates the number of Boer fighters in May 1901 to have been about 13,000. These armed men were dispersed into a very large number of guerilla bands, and they were in a great many cases men who seemingly had submitted to the British authorities, but afterwards had taken up arms. The annexation by Italy, during the Turco-Italian War, of Tripoli and Cyrenaica in November 1911, was likewise premature. See vol. i. § 239, and Rapisardi-Mirabelli in *R.I.*, 2nd ser., xv. (1913) pp. 527-544. But see also Tambora in the *Jahrbuch des Völkerrechts*, i. (1913) pp. 583-629, who asserts the contrary. And see vol. i. § 239 as to the annexation of Abyssinia by Italy in 1936.

<sup>2</sup> As regards the rights of the occupant of such neutral territory as has become the theatre of war see above, § 71.

administration over the territory and its inhabitants; and all legitimate<sup>1</sup> steps he takes in the exercise of this right must be recognised by the legitimate Government after occupation has ceased. But as the right of an occupant in occupied territory is merely a right of administration, he may neither annex it, while the war continues, nor set it up as an independent State, nor divide it (as Germany during the World War divided Belgium<sup>2</sup>) into two administrative districts for political purposes. Moreover, the administration of the occupant is in no wise to be compared with ordinary administration, for it is distinctly and precisely military administration. In carrying it out the occupant is totally independent of the constitution and the laws of the territory, since occupation is an aim of warfare, and the maintenance and safety of his forces, and the purpose of war, stand in the foreground of his interest, and must be promoted under all circumstances and conditions. But, although as regards the safety of his army and the purpose of war the occupant is vested with an almost absolute power, as he is not the sovereign of the territory he has no right to make changes in the laws,<sup>3</sup> or in the administration, other than those which are temporarily<sup>4</sup> necessitated by his interest in the maintenance and safety of his army and the realisation of the purpose of war. On the contrary, he has the duty of administering the country according to the existing laws and the existing rules of administration; he must ensure public order and safety, must respect family honour and rights, individual lives, private property, religious convictions and liberty.<sup>5</sup> It is clear that these

<sup>1</sup> See above, § 137, and below, §§ 279-284.

<sup>2</sup> Garner, ii. § 372.

<sup>3</sup> See below, § 172.

<sup>4</sup> There is no doubt, therefore, that the conversion, by the Germans in occupation of Belgium during the World War, of the University of Ghent into a Flemish institution was unlawful. See details in Garner, ii. §§ 368-370. For a German view as to the necessity of conciliating the Flemish population see Hattschek, p. 331.

<sup>5</sup> See Article 43 of the Hague

Regulations: 'The authority of the legitimate Power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.' After the World War Belgian courts refused to admit the validity of most of the laws and regulations issued by the German occupation authorities as going beyond the authorisation of Article 43; see *Commune of Grace-Berleur v. Colliery*

and other obligations of the occupant cannot be avoided by dint of the additional illegality of prematurely annexing the occupied territory.<sup>1</sup>

The implications of the non-observance of these principles was demonstrated when in the course of the war which broke out in September 1939 Germany occupied over one-third of Polish territory and annexed outright a substantial part of the occupied territory. Large numbers of the Polish inhabitants were removed to distant regions in order to provide room for German settlers; even larger numbers were drafted for forced labour in the interior of Germany; the operation of Polish law was suspended for the most part; in districts forthwith annexed by Germany, German law and courts were introduced; throughout the occupied territory the civil and political rights of the population were subordinated in a determined fashion to the principles of German legislation and administration.<sup>2</sup>

§ 170. An occupant having military authority over the territory, the inhabitants are under his Martial Law,<sup>3</sup> and have to render obedience to his commands.<sup>4</sup> Their duty to obey does not, of course, arise from their own Municipal Law, nor from International Law, but from the Martial Law of the occupant to which they are subjected. However, the power of the occupant over the inhabitants is not unrestricted, for Articles 23, 44, and 45 of the Hague Regu-

Rights  
of the  
Occupant  
regarding  
the In-  
habitants.

of Gosson Lagasse (Belgian Court of Cassation), *Annual Digest*, 1919-1922, Case No. 326; *Mathot v. Longué* (Court of Appeal of Liège), *ibid.*, Case No. 329. On the other hand, they recognised them as having legal effect when their reasonableness was proved, for instance, in cases when the regulations aimed at reducing the prices of commodities. See *Bochart v. Comité des Supplies of Corneux* (Court of Appeal of Liège), *ibid.*, Case No. 327; *Uilekens v. De Haas* (District Court of Rotterdam), *ibid.*, Case No. 336; *City of Maline v. Société Centrale pour l'Exploitation du Gaz* (Court of Appeal of Brussels), *ibid.*, 1925-1926, Case No. 362. As to changes in rules of procedure see *Marjamoff v. District of Włocławek* (Polish Supreme Court), *ibid.*, 1923-1924, Case No. 243.

<sup>1</sup> See vol. i. § 239 and p. 341, n. 1, above.

<sup>2</sup> In April 1940 Great Britain, France, and Poland in a joint declaration made a formal and public protest to the conscience of the world against these violations of International Law which Germany made no attempt to justify. For the text of the protest see *The Times* newspaper of April 18, 1940.

<sup>3</sup> See Hyde, ii. § 702.

<sup>4</sup> See Hyde, ii. §§ 697-700, and Schmieden, *Die persönliche Stellung der Landesbewohner im kriegsbesetzten Gebiet* (1916). As to the restrictions upon personal liberty and patriotic demonstrations imposed on occupied Belgium during the World War see Garner, ii. §§ 366-367.



lations<sup>1</sup> expressly enact that he is prohibited from compelling the inhabitants to take part in military operations against the legitimate Government, or to give information concerning the army of the other belligerent or his means of defence. Nor may he compel them to take an oath of allegiance. Since the authority of the occupant is not sovereignty, the inhabitants owe no temporary allegiance to him. On the other hand, he may compel them to take an oath—sometimes called an ‘oath of neutrality’—to abstain from taking up a hostile attitude against him and willingly to submit to his legitimate commands; and he may punish them severely for breaking this oath. He may make requisitions and demand contributions<sup>2</sup> from them. He may compel them to render services as drivers or farriers, and may compulsorily employ them to bury the dead, collect and remove the wounded, and bring up stores, supplies, baggage, and the like,<sup>3</sup> provided—see Article 52 of the Hague Regulations—the services required do not oblige them to take part in military operations against their own country. He may compel them to render services for the repair of roads, bridges, buildings, or other works damaged or destroyed by military operations, or necessary either for the administration of the country or for the needs of the army of occupation, always provided that the services do not involve taking part in military operations.<sup>4</sup>

Yet the meaning of ‘taking part in military operations’ is somewhat controversial. Many writers maintain, and *Land Warfare*<sup>5</sup> likewise asserts, that the words extend to the construction of bridges, fortifications, and the like, even behind the front. But the practice<sup>6</sup> of belligerents has

<sup>1</sup> Although the Hague Regulations cannot literally be applied in occupied enemy colonies populated by natives and having only a few white settlers, the latter must not be deported, unless it is a military necessity to do so.

<sup>2</sup> See above, §§ 147, 148.

<sup>3</sup> Formerly he could likewise compel them to render services as guides, but this was prohibited by the wording which Article 44 received from the Second Hague Conference.

But Germany, Austria-Hungary, Japan, Montenegro, and Russia signed with a reservation against Article 44, so that in the World War the old rule was valid that inhabitants may be compelled to serve as guides.

<sup>4</sup> As to the various contractual relations between the occupant and the inhabitants see Stauffenberg in *Z.ö.V.*, ii. (1931) pp. 86-119.

<sup>5</sup> § 391.

<sup>6</sup> See above, §§ 116 (n.), 126 (n.).

always distinguished between military *operations* and military *preparations*, and has not condemned as inadmissible the compulsion of inhabitants to render assistance in the construction of military roads, fortifications, and the like behind the front, or in any other works in preparation for military operations.<sup>1</sup> During the World War, not only the Germans in Belgium and France,<sup>2</sup> but also the Russians in Galicia,<sup>3</sup> compelled the inhabitants to construct fortifications and trenches in the rear, although a generous interpretation of Article 52 ought to have prevented them from doing so. It is to be hoped that a future conference will so amend the Hague Regulations as to make the matter clear.

However this may be, there is no right to deport inhabitants to the country of the occupant, for the purpose of compelling them to work there. When during the World War the Germans deported to Germany several thousands of Belgian<sup>4</sup> and French men and women, and compelled

<sup>1</sup> Attempts have been made to obtain the prohibition of the requisitioning of even such services as only involve taking part in military *preparations*. Thus the Russian draft put before the Conference of Brussels in 1874 proposed (Article 48) to stipulate that the population of an occupied province might not be forced to take part in the military operations against their own Government, or in such acts as are contributory to the realisation of the aims of war detrimental to their own country; but the Conference struck out the words in italics. It is true that the Oxford *Manuel des lois de la guerre sur terre* of the Institute of International Law did lay down (Article 48 (2)) the rule that an occupant must not compel inhabitants either to take part in the military operations or to assist him in his works of attack or defence; but the Hague Conferences did not adopt this rule, and Article 52 of the Hague Regulations prohibits the requisitioning of such services only as imply an obligation to take part in military operations. It is apparent that all attempts to extend the prohibition to services which imply an obligation to take part in military *preparations* and the like have hitherto failed.

<sup>2</sup> See details in Garner, ii. § 400, and see Hyde, ii. §§ 666 and 699.

<sup>3</sup> See Cybichowski in *Z.I.*, xxvi. (1916) p. 467.

<sup>4</sup> See Heuvel in *R.G.*, xxiv. (1917) pp. 261-300; Passeleq, *Les déportations belges à la lumière des documents allemands* (1917); Basdevant, *Les déportations du nord de la France et de la Belgique en vue du travail forcé et le droit international* (1917); Garner, ii. §§ 413-430. See for this and other aspects of the German occupation of France: Pauly, *Occupation allemande et guerre totale* (1930). In 1924, after proceedings by a Belgian deportee before the Belgian-German Mixed Arbitral Tribunal, which failed on the ground of jurisdiction (*Recueil des décisions des Tribunaux Arbitraux Mixtes*, 4th year, Nos. 45-48, pp. 674-686), it is reported that the German Government agreed with the organisation representing the Belgian deportees to pay them the sum of 24 million francs, subject to the approval of the mixed Arbitral Tribunal. See *London Times* newspaper, July 14, 1925, and Toynbee, *Survey of International Affairs*, 1924 (1926), p. 401, whose account is somewhat different; and Pirenne in *R.I.*, 3rd ser., v. (1924) pp. 102-116. That the deportations were in obvious

them to work there, the whole civilised world stigmatised this cruel practice as an outrage.

The occupant may collect the ordinary taxes, dues, and tolls imposed for the benefit of the State by the legitimate Government.<sup>1</sup> But in such case he is, according to Article 48 of the Hague Regulations, obliged to make the collection, as far as possible, in accordance with the rules in existence and the assessment in force, and he is bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.

Whoever does not comply with his commands, or commits a prohibited act, may be punished by him; but Article 50 of the Hague Regulations expressly enacts the rule that no general penalty, pecuniary or otherwise, may be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.<sup>2</sup> It must, however, be specially observed that this rule unfortunately does not at all prevent<sup>3</sup> reprisals by an occupant in case acts of illegitimate warfare are committed by enemy individuals not belonging to the armed forces, although in practice innocent individuals are thereby punished for illegal acts for which they are neither legally nor morally responsible. For instance, a village is burned by way of reprisal for a treacherous attack committed there on enemy soldiers by some unknown individuals.<sup>4</sup> Nor does Article 50 prevent an occupant from taking hostages<sup>5</sup>

disregard of International Law is clearly admitted by German writers; see, for instance, Hatschek, p. 312, n. 1, who, however, puts forward the plea of necessity. See also Hyde, ii. § 699 (n.), and Liszt, § 61, i. (1). As to a suggested convention to regulate the position of deported, evacuated, and refugee persons, see Ferrière in *Revue internationale de la Croix-Rouge* (summarised in *Journal of Comparative Legislation*, 3rd ser., v. (1923) pp. 291-293).

<sup>1</sup> See Hyde, ii. § 691.

<sup>2</sup> The Germans during their occupation of Belgium and Northern France in the World War regularly inflicted general penalties. See details in

Garner, ii. §§ 403-412, where the interpretation of Article 50 is also discussed.

<sup>3</sup> See Holland, *War*, No. 110, and *Land Warfare*, §§ 385-386. See also Zorn, pp. 239-243, where an important interpretation of Article 50 is discussed; Garner in *A.J.*, xi. (1917) pp. 511-537; Lawrence, § 180 (with note by Winfield); Hyde, ii. § 692; and below, §§ 248-250.

<sup>4</sup> See below, §§ 248-250, where objections against the existing law are formulated. This was the justification alleged by Germany for the burning of Louvain. Garner, i. §§ 282-284.

<sup>5</sup> But this is a moot point; see below, § 259.

to safeguard lines of communication threatened by guerillas not belonging to the armed forces, or for other purposes,<sup>1</sup> provided that he does not kill them, although they must suffer for acts or omissions of others, for which they are neither legally nor morally responsible.

In the treatment of the inhabitants of enemy territory, the occupant need not make any difference between subjects of the enemy and subjects of neutral States<sup>2</sup>; and resident subjects of neutral States have no claim, any more than have subjects of the enemy, against him for compensation for losses sustained in consequence of legitimate acts<sup>3</sup> of war on his part.<sup>4</sup>

<sup>1</sup> Belligerents sometimes take hostages for the purpose of securing compliance with demands for contributions, requisitions, and the like. As long as such hostages obtain the same treatment as prisoners of war, the practice does not seem to be illegal, although the Hague Regulations do not mention it, and many writers condemn it; see above, § 116 (n.), and below, § 259 (n.).

<sup>2</sup> See above, § 88, and Frankenbach, *Die Rechtsstellung von neutralen Staatsangehörigen in kriegführenden Staaten* (1910), pp. 46-50; Pitt Cobbett, *Cases and Opinions on International Law* (4th ed., 1924), ii. pp. 373-374; Hirsch, *Die rechtliche Stellung der Angehörigen neutraler Staaten* (1914), pp. 80-84; Borchard, §§ 101, 103. Schmid and Schmitz in *Z.ö.V.*, i. (1929) pp. 251-320. See also Bouffanais, *Les consuls en temps de guerres et de trouble* (1933), pp. 135-151.

<sup>3</sup> *Hardman's case* (see *A.J.*, vii. (1913) p. 879, and *B.Y.*, 1921-1922, pp. 197-200) is a good example. William Hardman was a British subject resident in Siboney, a town in Cuba, when in 1898, during the Spanish-American War, it was occupied by armed forces of the United States. As there was an outbreak of sickness among the American troops, and fear of yellow fever, the American military authorities found it necessary, in the interest of the health of the troops, to destroy by fire a number of houses, together with all the furniture and personal belongings

of the inhabitants. Hardman was one of these unfortunate inhabitants, and, after the end of the war, the British Government claimed on his behalf the sum of £93 as the value of his destroyed personal property. Both the British and American Governments agreed that a subject of a neutral Power resident in an enemy country during military occupation cannot legally claim compensation for losses sustained by an act of war on the part of the occupant; but the British Government maintained that the burning of the houses in Siboney was not an act of war, but simply a measure for better securing the health of the American troops. The case was one of those decided in 1913 by the British and American Claims Arbitral Tribunal. The arbitrators gave their award against the British Government, because they considered the act to be an act of war, but recommended the American Government to indemnify Hardman for the loss suffered, as an act of grace. And see the *Luzon Sugar Refining Co. case*, decided in 1926 by the same Tribunal; *Annual Digest*, 1925-1926, Case No. 164.

<sup>4</sup> But a belligerent may, of course, grant compensation nevertheless. Thus, when in 1914, during the World War, after the occupation of Liège, the Germans executed a number of civilians, and among them five Spaniards, by way of reprisal for alleged attacks by the civilian population upon German soldiers, they granted monetary compensation

Position  
of Govern-  
ment Offi-  
cials and  
Municipal  
Function-  
aries  
during  
Occupation.

§ 171. As, through occupation, authority over the territory actually passes into the hands of the occupant, he may, for the time of his occupation, depose all Government officials and municipal functionaries that have not withdrawn with the retreating enemy. On the other hand, he must not compel them by force to carry on their functions during occupation, if they refuse to do so, except where military necessity for the carrying on of a certain function arises. If they are willing to serve under him, he may make them take an oath of obedience, but not of allegiance, and he may not compel them to carry on their functions in his name, though he may prevent them from doing so in the name of the legitimate Government.<sup>1</sup> Since, according to Article 43 of the Hague Regulations, he has to secure public order and safety, he must temporarily appoint other functionaries in case those of the legitimate Government refuse to serve under him, or are deposed by him for the time of the occupation.

Position  
of Courts  
of Justice  
during  
Occupation.

§ 172. The particular position which courts of justice have nowadays in civilised countries makes it necessary to discuss their position during occupation.<sup>2</sup> As has already been explained,<sup>3</sup> the British and American interpretation of Article 23 (*h*) of the Hague Regulations is that it prohibits an occupant of enemy territory from declaring extinguished, suspended, or unenforceable in a court of law the rights and the rights of action of the inhabitants ;

to the families of the unfortunate Spaniards, although they asserted that their execution was justified as reprisals. See the case of *Eastern Extension etc. Telegraph Co.* (*Annual Digest*, 1923-1924, Case No. 225) on the discretion of the belligerent in making these *ex gratia* payments. And see, as bearing on this point, the Swiss claims against Great Britain and France before the Council of the League in 1934, *Off. J.*, 1934, pp. 1486 *et seq.* See on this dispute Lapradelle, *Les Suisses et les dommages de guerre* (1931), and above, p. 86. And see, generally, *Harvard Research* (1939), pp. 386-391.

<sup>1</sup> Many writers assert that in case an occupant leaves officials of

the legitimate Government in office, he 'must' pay them their ordinary salaries. There is no customary or conventional rules in existence concerning this point. It is in an occupant's own interest to pay such salaries, and he will as a rule do this. Only in the case of Article 48 of the Hague Regulations is he compelled to do it. See *Kotra and Others v. Czechoslovak State* decided by the Hungaro-Czechoslovak Mixed Arbitral Tribunal in February 1934: *Annual Digest*, 1933-1934, Case No. 221.

<sup>2</sup> See Petit, *L'administration de la justice en territoire occupé* (1900).

<sup>3</sup> See above, § 100a.

and Article 43 provides that the occupant must respect, unless absolutely prevented, the laws in force in the country.<sup>1</sup> But an occupant may, where necessary, set up military courts instead of the ordinary courts; and in case, and in so far as, he admits the administration of justice by the ordinary courts, he may nevertheless, so far as it is necessary for military purposes, or for the maintenance of public order and safety, temporarily alter the laws,<sup>2</sup> especially the Criminal Law, on the basis of which justice is administered as well as the laws regarding procedure.<sup>3</sup>

There is no doubt that an occupant may suspend the judges as well as other officials. However, if he does suspend them, he must temporarily appoint others in their place. If they are willing to serve under him, he must respect their independence according to the laws of the country. He has, however, no right to constrain the courts to pronounce their verdicts in his name, although he need not allow them to pronounce verdicts in the name of the legitimate Government.<sup>4</sup>

<sup>1</sup> See p. 342, n. 5. As to the subjection of the occupation authorities, in regard to contracts concluded with the inhabitants, to the local jurisdiction see Stauffenberg in *Z.ö.V.*, ii. (1931) pp. 86-119.

<sup>2</sup> See p. 342, n. 5.

<sup>3</sup> As to the practice followed by the Germans in occupied Belgium during the World War see Garner, ii. §§ 365-367, 373-376; and for the practice of the Italians in occupation of Austrian territory see Gemma, p. 355. As to the special tribunals in civil matters established by the German authorities in Belgium see *Cambier v. Lebrun and Others* (Belgian Court of Cassation), *Annual Digest*, 1919-1922, Case No. 325; *Verdyck v. Voncken* (Civil Tribunal of Antwerp), *ibid.*, Case No. 330. See in particular *City of Antwerp v. Germany* (Germano-Belgian Mixed Arbitral Tribunal), *ibid.*, 1925-1926, Case No. 361, where Germany was held responsible on account of sums which the plaintiff was compelled to pay in pursuance of awards of tribunals established by the German occupation authorities in Belgium. As to France see *In re X.*

(Court of Appeal of Nancy), *ibid.*, 1919-1922, Case No. 334.

For an interpretation of Article 43 to the effect that the occupant is not entitled to try by his own courts and within his own territory crimes committed in occupied territory see *Republic v. Ofcynski* (Polish Supreme Court), *ibid.*, Case No. 338.

<sup>4</sup> A case that happened during the Franco-German War may serve as an illustration. In September 1870, after the fall of the Emperor Napoleon and the proclamation of the French Republic, the Court of Appeal at Nancy pronounced its verdicts 'in the name of the French Government and People.' Since Germany had not yet recognised the French Republic, the Germans ordered the Court to use the formula 'In the name of the High German Powers occupying Alsace and Lorraine,' but gave it to understand that, if it objected to this formula, they were disposed to admit another, and were even ready to admit the formula 'In the name of the Emperor of the French,' as the Emperor had not abdicated. The Court, however, re-

fused to pronounce its verdict otherwise than 'in the name of the French Government and People,' and, consequently, suspended its sittings. There can be no doubt that the Germans had no right to order the formula 'In the name of the High German Powers, etc.' to be used, but they were certainly not obliged to admit the formula preferred by the Court; and the fact that they were disposed to admit another formula ought to have made the Court accept a compromise. Bluntschli (§ 547) correctly maintains that the most natural solution of the difficulty would have been to use the neutral

formula 'In the name of the Law.'

On the other hand, during the occupation of Belgium in the World War, Germany did not interfere with the practice of the Belgian courts of pronouncing and executing their verdicts in the name of the King of the Belgians (see *Deutsche Juristen-Zeitung* (1915), p. 805). But matters changed when in 1918 the Belgian courts suspended their sittings in consequence of the deportation of some of the judges, and German courts were set up in their place (see Garner, ii. §§ 377-378). See Wunderlich, *Der belgische Justizstreik* (1930).

# CHAPTER IV

## WARFARE ON SEA

### I

#### ON SEA WARFARE IN GENERAL

Hall, § 147—Lawrence, §§ 193-194—Westlake, ii. pp. 136-154—Maine, pp. 117-122—Manning, pp. 183-184—Phillimore, iii. § 347—Twiss, ii. § 73—Halleck, ii. pp. 96-98—Taylor, § 547—Wharton, iii. §§ 342-345—Wheaton, § 355—Bluntschli, §§ 665-667—Heffter, § 139—Geffcken in *Holtzendorff*, iv. pp. 547-548, 571-581—Ullmann, §§ 187-188—Fauchille, §§ 1268, 1273-1382 (1)—Despagnet, Nos. 647-649—Pradier-Fodéré, viii. Nos. 3066-3090, 3107-3108—Nys, iii. pp. 391-432—Rivier, ii. pp. 329-335—Calvo, iv. §§ 2123, 2379-2410—Fiore, iii. Nos. 1399-1413—Cruchaga, §§ 937-944—Rolin, §§ 558-573, 620-625—Hyde, ii. §§ 710, 771-772—Verzijl, §§ 305-343—Pillet, pp. 118-120—Perels, § 36—Testa, pp. 147-157—Boeck, Nos. 3-153—Lawrence, *International Problems and Hague Conferences* (1908), pp. 178-206—Westlake, *Papers*, pp. 250-258—Reddie, *Researches, passim*—Ortolan, ii. pp. 35-50—Hautefeuille, i. pp. 161-167—Schramm, §§ 1, 8—Wehberg, §§ 1, 2—J. A. Hall, *Law of Naval Warfare* (1921)—Leroux, *Le droit international pendant la guerre maritime russo-japonaise* (1924)—Schönborn, *Recht und Technik im modernen Seekriegerecht* (a paper, 1929)—Richmond, *Sea Power in the Modern World* (1934)—Genet, § 1-63—Sandiford, *Diritto marittimo di guerra* (1938)—Martin du Puytison, *De l'influence exercée par l'invention aéronautique sur la guerre navale et son régime juridique* (1938)—Gessner, Westlake, Lorimer, Rolin-Jaequemyns, Laveleye, Albéric Rolin, and Pierantoni in *R.I.*, vii. (1875) pp. 236-272, 558-656—Twiss in *R.I.*, xvi. (1884) pp. 113-137—Quigley in *A.J.*, xi. (1917) pp. 22-45—Bower in *A.J.*, xiii. (1919) pp. 60-78—Rodgers in *A.J.*, xvii. (1923) pp. 1-14—Hussey and Trimble in *A.S. Proceedings*, 1930, pp. 115-126—Gardiner in *Law Quarterly Review*, xlviii. (1932) pp. 521-546—Brunetti in *Diritto marittimo*, 39 (1937), pp. 347-361—Smith in *Hague Recueil*, 63 (1938) (i.), pp. 608-632. See also the authors quoted below, § 178.

§ 173. The purpose of war is the same in the case of warfare on land or on sea—namely, the overpowering of the enemy. But sea warfare serves this purpose by attempting the accomplishment of aims different from those of land warfare. Whereas the aims of land warfare are defeat of

Aims and Means of Sea Warfare.



the enemy army and occupation of the enemy territory, the aims<sup>1</sup> of sea warfare are : defeat of the enemy navy ; annihilation of the enemy merchant fleet ; destruction of enemy coast fortifications, and of maritime as well as military establishments on the enemy coast ; cutting off intercourse with the enemy coast ; prevention of carriage of contraband and of rendering unneutral service to the enemy ; all kinds of support to military operations on land, such as protection of a landing of troops on the enemy coast ; and lastly, defence of the home coast and protection to the home merchant fleet.<sup>2</sup> The means by which belligerents in sea warfare endeavour to realise these aims are : attack on, and seizure of, enemy vessels, violence against enemy individuals, appropriation and destruction of enemy vessels and sea-borne enemy goods, requisitions and contributions, bombardment of the enemy coast, cutting of submarine cables, blockade, espionage, treason, ruses, and capture of neutral vessels carrying contraband or rendering unneutral service.

Lawful  
and  
Unlawful  
Practices  
of Sea  
Warfare.

§ 174. As in land warfare, so in sea warfare, not every practice capable of injuring the enemy in offence and defence is lawful. Although no regulations regarding the laws of war on sea have as yet been enacted by a general law-making treaty corresponding to the Hague Regulations, there are treaties concerning special points—such as submarine mines, bombardment by naval forces—and customary rules of International Law which regulate the matter. Be that as it may, the rules concerning means of sea warfare, though in many points identical with the rules in force regarding warfare on land, differ from them in many respects, and therefore must be discussed separately.

Objects of  
the Means  
of Sea  
Warfare.

§ 175. Whereas the objects against which means of land warfare may be directed are innumerable, the number of the objects against which means of sea warfare are directed is limited to six.<sup>3</sup> The chief object is enemy vessels, whether public or private ; the next, enemy individuals, with a

<sup>1</sup> Aims of sea warfare must not be confused with ends of war ; see above, § 66.

<sup>2</sup> See the aims of sea warfare

enumerated in Article 1 of the U.S. Naval War Code.

<sup>3</sup> Unless enemy aircraft may be included.

distinction between those taking part in fighting and others ; the third, sea-borne enemy goods ; the fourth, the enemy coast ; the fifth and sixth, neutral vessels attempting to break blockade, carrying contraband, or rendering unneutral service to the enemy.<sup>1</sup>

§ 176. It is evident that in times when a belligerent could destroy all public and private enemy property he was able to seize, no special rule existed regarding private enemy ships and private enemy property carried on the sea. But the practice of sea warfare frequently went beyond the limits of even so wide a right, treating neutral goods on enemy ships as enemy goods, and neutral ships carrying enemy goods as enemy ships. It was not until the time of the *Consolato del Mare*, in the fourteenth century, that a set of clear and definite rules with regard to private enemy vessels and private enemy property on sea in contradistinction to neutral ships and neutral goods was adopted. According to this famous collection of maritime usages observed in the Middle Ages by the communities of the Mediterranean, a belligerent might seize and appropriate all private enemy ships and goods. But a distinction was made if either ship or goods were neutral. Although an enemy ship might always be appropriated, neutral goods thereon had to be restored to the neutral owners. On the other hand, enemy goods on neutral ships might be appropriated, but the neutral ships carrying such goods had to be restored to their owners. However, these rules of the *Consolato del Mare* were not at all generally and continuously recognised, although they were adopted by several treaties between single States during the fourteenth and fifteenth centuries. Neither the communities belonging to the Hanseatic League, nor the Netherlands and Spain during the War of Independence, nor England and Spain during their wars in the sixteenth century, adopted these rules ; and France expressly enacted by Ordinances of 1543 (Article 42) and 1584 (Article 69) that neutral goods on enemy ships as well as neutral ships carrying enemy goods should be appropriated.<sup>2</sup>

Develop-  
ment of  
Inter-  
national  
Law  
regarding  
Private  
Property  
on Sea.

<sup>1</sup> See Hyde, ii. § 710.

<sup>2</sup> *Robe d'ennemy confisque celle d'amy. Confiscantur ex navibus res, ex rebus naves.*

Although in 1650 France adopted the rules of the *Consolato del Mare*, Louis XIV. dropped them again by the Ordinance of 1681, and re-enacted that neutral goods on enemy ships, and neutral ships carrying enemy goods, should be appropriated. Spain enacted the same rules in 1718. The Netherlands, in contradistinction to the *Consolato del Mare*, endeavoured by a number of treaties to foster the principle that the flag covers the goods, so that enemy goods on neutral vessels were exempt from, whereas neutral goods on enemy vessels were subject to, appropriation. On the other hand, throughout the eighteenth century, and during the nineteenth century down to the beginning of the Crimean War in 1854, England adhered to the rules of the *Consolato del Mare*. Thus no generally accepted rules of International Law regarding private property on sea were in existence.<sup>1</sup> Matters were made worse by privateering, which was generally recognised as lawful, and by the fact that belligerents frequently declared a coast blockaded without having a sufficient number of men-of-war on the spot to make the blockade effective. It was not until the Declaration of Paris in 1856 that general rules of International Law regarding private property on sea came into existence.

Declara-  
tion of  
Paris.

✓ § 177. Things began to undergo a change with the outbreak of the Crimean War in 1854; all the belligerents proclaimed that they would not issue letters of marque; Great Britain declared that she would not seize enemy goods on neutral vessels; and France declared that she would not appropriate neutral goods on enemy vessels. Although this alteration of attitude on the part of the belligerents was originally intended for the Crimean War only and exceptionally, it led after the conclusion of peace in 1856 to the famous and epoch-making Declaration of Paris,<sup>2</sup> which enacted the four rules—(1) that privateering is abolished, (2) that the

<sup>1</sup> Boeck, Nos. 3-103, and Geffcken in *Holtzendorff*, iv. pp. 571-578, give excellent summaries of the facts.

<sup>2</sup> See Martens, *N.R.G.*, xv. p. 767, and above, vol. i. § 559. See also Piggott, *The Declaration of Paris* (1919), who is an opponent of the

Declaration, and Stockton in *A.J.*, xiv. (1920) pp. 356-368. And see Malkin in *B.Y.*, 1927, pp. 1-44, on the inner history of the Declaration, and Schmitt, *Die Vorgeschichte der in der Pariser Seerechtsdeklaration niedergelegten Grundsätze* (1934).

neutral<sup>1</sup> flag covers enemy goods<sup>2</sup> with the exception of contraband of war, (3) that neutral goods, contraband of war excepted, are not liable to capture under the enemy flag, (4) that blockades, in order to be binding, must be effective, *i.e.* maintained by a force sufficient really to prevent access to the coast of the enemy. Since, with the exception of the United States of America and a few other States, all members of the Family of Nations are now parties to the Declaration of Paris, it may well be maintained that the rules quoted are general International Law, the more so as the non-signatory Powers have hitherto in practice always acted in accordance with those rules.

However, through the application of the doctrine of continuous voyages by the United States during the Civil War in the form of the doctrine of continuous transportation,<sup>3</sup> through the application of that doctrine even to conditional contraband during the World War, by a number of pre-

<sup>1</sup> Only the *neutral* flag covers enemy goods, not the flag of a belligerent, who may, therefore, seize enemy goods carried by his own or allied merchantmen (*The Roumanian* (1915) 1 B. and C.P.C. 536; [1916] 1 A.C. 124; *The Gotland* (1916) 86 L.J. (P.) 23; L.R., v. 39. See above, § 102, and below, § 197 n.). The neutral flag protects enemy goods only so long as they are under it; they lose protection so soon as they are transhipped into lighters (*The Dandolo* (1916) 2 B. and C.P.C. 339). And see Garner, *Prize Law*, Nos. 243, 244. On the other hand, when enemy goods shipped in enemy vessels before the outbreak of war are transhipped *in transitu* into neutral vessels, the neutral flag does not, according to British practice, protect them (*The Jeanne* (1916) 2 B. and C.P.C. 227; *The Barcean* (1917) 3 B. and C.P.C. 116); unless the original *transitus* has been determined—*The Vesta* [1921] 1 A.C. 774; 3 B. and C.P.C. 897. Although the Declaration of Paris is a declaration in favour of neutral commerce, not only the neutral concerned, but also the enemy, can claim restitution of non-contraband goods seized in spite of being carried by a neutral vessel (*The*

*Dirigo* [1919] P. 204; 3 B. and C.P.C. 439). And see below, p. 685, n. 1, on cases covered by the further exception of the doctrine of infection.

<sup>2</sup> It has been asserted—see, for instance, Rivier, ii. p. 429, and Schramm, p. 93—that the neutral flag covers only private, not public, enemy property, and therefore that such goods on neutral vessels as belong to the State of the enemy may be seized and appropriated. The Italian Prize Court in 1912, during the Turco-Italian War, in *The Sheffield*, *The Newa*, and *The Menzale*, gave its decision in favour of this opinion (see Coquet in *R.G.*, xxi. (1914) pp. 281-290). The Declaration of Paris speaks of *marchandise neutre* without any qualification, only excepting contraband goods, and it would therefore appear that public enemy property enjoys the protection of the neutral flag. However, it is controversial whether such literal interpretation would be in accordance with the object of the Declaration, which, it has been asserted, was concerned with private property only. See Smith in *Hague Recueil*, 63 (1938) (i.), pp. 624-632, and in *Law Quarterly Review*, 55 (1939), pp. 237-249. See below, § 319 (n.).

<sup>3</sup> See below, § 401.

sumptions of hostile destination, by the imposition of a duty upon a neutral consignor of proving the innocent destination of the cargo, and by an enormous extension of the list of contraband,<sup>1</sup> the rule of the Declaration of Paris, that a neutral flag covers enemy goods with the exception of contraband of war, has to a great extent been frustrated.<sup>2</sup>

The Principle of Appropriation of Private Enemy Vessels and Enemy Goods thereon.

§ 178. The Declaration of Paris did not touch the old rule that private enemy vessels and private enemy goods thereon, or on ships of the capturing belligerent, may be seized and appropriated, and this rule is, therefore, as valid as ever, although there has been much agitation for its abolition. It cannot be denied that the movement,<sup>3</sup> since the middle of the eighteenth century, for the abolition of the rule that private enemy vessels and sea-borne goods may be captured, might, during the second half of the nine-

<sup>1</sup> See below, §§ 393, 394, 403a.

<sup>2</sup> See Quigley, *The Immunity of Private Property from Capture at Sea* (1918), and in *A.J.*, xi. (1917) pp. 22-31, and Verzijl, §§ 305-343. See also Moore in *Columbia Law Review*, xxvii. (1927) pp. 403, 404.

<sup>3</sup> In 1785, Prussia and the United States of America had already stipulated by Article 23 of their Treaty of Friendship (see Martens, *R.*, iv. p. 37) that in case of war between them, merchantmen should not be seized and appropriated. Again, in 1871, the United States and Italy, by Article 12 of their Treaty of Commerce (see Martens, *N.R.G.*, 2nd ser., i. p. 57), stipulated that in case of war between them, merchantmen, with the exception of those carrying contraband of war or attempting to break a blockade, should not be seized and appropriated. In 1823 the United States had already made a proposal to Great Britain, France, and Russia (see Wharton, iii. § 342, pp. 260-261, and Moore, vii. § 1198, p. 466) for a treaty abrogating the rule that enemy merchantmen and enemy goods thereon may be appropriated; but Russia alone accepted the proposal, and then only on the condition that all other naval Powers consented. Again, in 1856 (see

Wharton, iii. § 342, pp. 270-287, and Moore, vii. § 1198, p. 466), on the occasion of the Declaration of Paris, the United States endeavoured to obtain the victory of the principle that enemy merchantmen should not be appropriated, making it a condition of her accession to the Declaration of Paris that this principle should be recognised. But again the attempt failed, owing to the opposition of Great Britain. In 1866, Italy, by Article 211 of her Marine Code, enacted that, in case of war with any other State, enemy merchantmen (not carrying contraband of war or breaking a blockade) should not be seized and appropriated, provided reciprocity was granted. At the outbreak of war in 1866, Prussia and Austria expressly declared that they would not seize and appropriate each other's merchantmen. At the outbreak of the Franco-German War in 1870, Germany declared French merchantmen exempt from capture, but changed her attitude when France did not act upon the same lines. The United States of America made unsuccessful attempts (see Halls, *The Peace Conference at The Hague*, pp. 306-321, and Scott, *Conferences*, pp. 699-707) to secure immunity from capture for enemy merchantmen and goods at sea at the First and Second Hague Conferences.

teenth century, have met with success but for the decided opposition of Great Britain. Public opinion in Great Britain was not, and is not, prepared to consent to the abolition of this rule; and there is no doubt that its abolition would involve a certain amount of danger to a country like Great Britain, whose position and power depend chiefly upon her navy. The possibility of annihilating an enemy's commerce by annihilating his merchant fleet is a powerful weapon in the hands of a great naval Power. Moreover, if enemy merchantmen are not captured they can be fitted out as cruisers, or at least be used for the transport of troops, munitions, and provisions. Before the World War several maritime States made arrangements with their steamship companies to secure the building of their transatlantic liners according to plans which made them easily convertible into men-of-war, and these vessels were of great service to the belligerents in that war.

From the end of the nineteenth century to the outbreak of the World War it was not the attitude of Great Britain alone which stood in the way of the abolition of the rule that sea-borne private enemy property may be confiscated. With the growth of navies among Continental Powers, these Powers learned to appreciate the value of the rule in war, and the outcry against the capture of merchantmen became less loud. Even if Great Britain had in or about 1912 proposed the abolition of the rule, it is probable that a greater number of the maritime States would have refused to accede. For at the Second Hague Conference, France, Russia, Japan, Spain, Portugal, Mexico, Colombia, and Panama, besides Great Britain, voted against its abolition<sup>1</sup>; and there was noticeable before the World War a slow, but constant, increase in the number of Continental writers<sup>2</sup> who opposed

<sup>1</sup> The Italian War Regulations of 1938 provide expressly, in Article 144, that private enemy vessels are liable to capture and condemnation.

<sup>2</sup> See, for instance, Perels, § 36, pp. 195-198; Röpcke, *Das Seebeute-recht* (1904), pp. 36-47; Dupuis, Nos. 29-32; Pillet, p. 199; Giordana, *La proprietà privata nelle guerre marittime, etc.* (1907); Niemeyer, *Prin-*

*zipien des Seekriegsrechts*, (1909); Boidin, pp. 144-167; Hirschmann, *Das internationale Priisenrecht* (1912), § 2. On the other hand, the Institute of International Law has several times voted in favour of the abolition of the rule; see *Tableau général de l'institut de droit international* (1893), pp. 190-193, and *Annuaire*, xxv. (1912) p. 600. The literature con-

the abolition of the practice of capturing enemy merchantmen, to which so much objection was once taken.

Codification of Law of Sea Warfare.

§ 179. Be that as it may, the time did not then seem very far distant when the Powers would come to an agreement on this, as on other points of sea warfare, in a code of regulations regarding sea warfare analogous to the Hague Regulations regarding warfare on land. A beginning was made by the United States of America by her Naval War Code<sup>1</sup> published in 1900, although she withdrew it in 1904. Later, the Second Hague Conference produced a number of conventions dealing with some parts of sea warfare, namely: (1) the VIth, relative to the Status of Enemy Merchantships at the Outbreak of Hostilities; (2) the VIIth, relative

cerning the confiscation of private enemy property at sea is abundant. See, besides those already quoted at the commencement of § 173, Upton, *The Law of Nations affecting Commerce during War* (1863); Cauchy, *Du respect de la propriété privée dans la guerre maritime* (1866); Vidari, *Del rispetto della proprietà privata fra gli stati in guerra* (1867); Gessner, *Zur Reform des Kriegsseerechts* (1875); Klobukowski, *Die Seebeute oder das feindliche Privateigentum zur See* (1877); Bluntschli, *Das Beuterecht im Kriege und das Seebeuterecht insbesondere* (1878); Boeck, *De la propriété privée ennemie sous pavillon ennemi* (1882); Dupuis, *La guerre maritime et les doctrines anglaises* (1899); Leroy, *La guerre maritime* (1900); Röpeke, *Das Seebeuterecht* (1904); Hirst, *Commerce and Property in Naval Warfare; A Letter of the Lord Chancellor* (1906); Hammann, *Der Streit um das Seebeuterecht* (1907); Wehberg, pp. 207-256, and *Das Beuterecht im Land- und Seekrieg* (1909); Cohen, *The Immunity of Enemy's Property from Capture at Sea* (1909); Macdonell, *Some Plain Reasons for Immunity from Capture of Private Property at Sea* (1910); Huttenheim, *Die Handelsschiffe der Kriegführenden* (1912); Loreburn, *Capture at Sea* (1913); Schramm, § 8; Balladore Pallieri, pp. 267-275; Slade in the *Naval Annual* (1914), pp. 88-98; Westlake, *Papers*, pp. 613-619; Quigley in *A.J.*, xi. (1917) pp. 32-

45; Stier-Somlo, *Die Freiheit der Meere und das Völkerrecht* (1917); Hays in *A.J.*, xii. (1918) pp. 283-290; Meurer, *Das Programm der Meeresfreiheit* (1918); Davidson, *The Freedom of the Seas* (1918); Quigley, *The Immunity of Private Property from Capture at Sea* (1918); De Louter in *R.G.*, xxvi. (1919) pp. 98-98; Piggott, *The Freedom of the Seas* (1919); Hershey in *A.J.*, xiii. (1919) pp. 207-226; Garner, *Developments*, pp. 798-800; Hyde, ii. §§ 771-772; Dumas, *Les aspects économiques du droit de prise avant la guerre mondiale* (1926); the same, *Les aspects économiques du droit de prise après la guerre mondiale* (1926); Richmond in *B.Y.*, 1928, pp. 50-58; Baty, pp. 489-498; Butler and Maccoby, *The Development of International Law* (1928), pp. 268-278; Lord Eustace Percy, *Maritime Trade in War* (1930); Crecraft, *Freedom of the Seas* (1935); Jessup and Deak, *Neutrality*, i.: *Origins* (1935), pp. 124-156. See also the literature quoted by Fauchille, § 1324, Pradier-Fodéré, viii. Nos. 3070-3090, and Boeck, Nos. 382-572, where the arguments of the authors against, and in favour of, the present practice are discussed.

<sup>1</sup> See above, vol. i. § 32, and Stockton in the *A.S. Proceedings*, vi. (1913) pp. 115-123. As to the Naval Codes of some other Powers see Garner, i. §§ 7-9.

to the Conversion of Merchant-ships into Warships ; (3) the VIIIth, relative to the Laying of Automatic Submarine Contact Mines ; (4) the IXth, respecting Bombardments by Naval Forces ; (5) the XIth, relative to certain Restrictions on the Exercise of the Right of Capture in Maritime War.<sup>1</sup>

After the World War the only subject of rules of warfare at sea regulated by treaty has been the use of submarines against merchant-vessels (see below, § 194a).<sup>2</sup>

## II

### ATTACK AND SEIZURE OF ENEMY VESSELS

Hall, §§ 138, 148—Lawrence, § 182—Westlake, ii. pp. 154-162, 312-316—Phillimore, iii. § 347—Twiss, ii. § 73—Halleck, ii. pp. 123-125—Taylor, §§ 545-546—Moore, vii. §§ 1175, 1183, etc.—Walker, § 50, p. 147—Wharton, iii. § 345—Hershey, Nos. 404, 405, 423-426—Bluntschli, §§ 664-670—Heffter, §§ 137-139—Ullmann, § 188—Fauchille, §§ 1313-1313 (6), 1395-1395 (9)—Despagnet, Nos. 654-659—Rivier, ii. § 66—Nys, iii. pp. 432-449—Pradier-Fodéré, viii. Nos. 3155-3165, 3176-3178—Calvo, iv. §§ 2368-2378—Fiore, iii. Nos. 1414-1424, and *Code*, Nos. 1665-1671—Rolin, §§ 599-611, 715-741, 862-875—Mérignhac-Lémonon, ii. pp. 90-119—Hyde, ii. §§ 736-749, 766-770—Verzijl, §§ 182-186, 383-396, 697-718—Colombos, *Law of Prize* (1926), §§ 94-161—Genet, §§ 253-269, 273-316—Garner, *Prize Law*, Nos. 139-190—Pillet, pp. 121-128—Perels, § 35—Lawrence, *War*, pp. 48-55, 93-111—Ortolan, ii. pp. 31-34—Boeck, Nos. 190-208—Dupuis, Nos. 150-158, and *Guerre*, Nos. 74-112—U.S. Naval War Code, Articles, 13-16—Bernsten, §§ 7-8—Schramm, § 8—Wehberg, pp. 174-207—Garner, i. §§ 214-215, 220-222, ii. §§ 532-537—Hudson in *A.J.*, xvi. (1922) pp. 375-390—Herzog in *A.J.*, xviii. (1924) pp. 483-506.

§ 180. Whereas in land warfare all sorts of violence against enemy individuals are the chief means, in sea warfare attack and seizure of enemy vessels are the most important means. For together with enemy vessels a belligerent takes possession of the enemy individuals and enemy goods thereon, so that he can appropriate vessels and goods, as well as detain those enemy individuals who are liable to be interned as prisoners of war. For this reason, and compared with

Importance of Attack and Seizure of Enemy Vessels.

<sup>1</sup> The Institute of International Law, at its meeting at Oxford in 1913, adopted a draft code of maritime warfare (*Manuel des lois de la guerre maritime*). The Declaration of

London was primarily concerned with neutrality.

<sup>2</sup> As to the Habana Convention on Maritime Neutrality see above, § 68 (n.).



attack and seizure of enemy vessels, violence against enemy persons, and the other means of sea warfare, play only a secondary part, although they are certainly not unimportant. For a weak naval Power can even restrict the operations of its fleet to mere coast defence, and thus totally refrain from directly attacking and seizing enemy vessels.

Attack,  
when  
legiti-  
mate.

§ 181. All enemy men-of-war<sup>1</sup> and other public vessels, which are met by a belligerent's men-of-war on the high seas, or within the territorial waters<sup>2</sup> of either belligerent,<sup>3</sup> may at once be attacked, and the attacked vessel may, of

<sup>1</sup> A ship which is an 'armed ship' for the purpose of justifying an award of British prize bounty to the officers and crew of a ship who were present at her taking or destruction is not necessarily an armed ship for international belligerent purposes, but the following decisions relating to prize bounty may be mentioned: *H.M. Submarine E 14* [1920] A.C. 403; *In re Naval Operations in Mesopotamia, 1914-1915* [1923] P. 149; *In re The Destruction of Certain Armed Turkish Vessels (H.M. Submarine E 12)* [1924] P. 29.

<sup>2</sup> Whether enemy merchantmen may be captured in rivers is a controverted question. See Wehberg, pp. 80-61, and Biensfeldt in *Z.V.*, x. (1917) pp. 375-381, and the several authors there quoted. See also Garner, *Prize Law*, Nos. 144-146. There ought to be no doubt that they may be captured in parts of rivers which are navigable from the sea by sea-going vessels, and that sea-going vessels may also be captured in parts of rivers not navigable from the sea, if they have been brought there for the purpose of saving them from capture. The Institute of International Law (see Article 1 of its *Manuel de la guerre maritime* (1913)) had answered the question in the negative; but during the World War the various Prize Courts have answered it in the affirmative. In a judgment of the Italian Prize Court (see *The Cervignano* and *The Friuli*, Fauchille, *Jur. ital.* (1917), pp. 178-183), condemning in 1917 two dismantled Austrian vessels moored in a river port, it is mentioned that the German Prize Courts had condemned some Belgian ships moored in the German

Rhine port of Duisburg, and the Russian vessel *Primula*, captured in the River Trave, which leads from Lübeck to Frauenmünde—Fauchille, *Jur. all.* (1915), pp. 13-16. See also *Le Caux v. Eden* (1781) 2 Doug. 594; *Lindo v. Rodney* (1782), *ibid.*, 613 (n.); *The Cotton Plant* (1870) 10 Wall. 577. As to the seizure of enemy cargoes in the docks, wharves, and quays of a port or in warehouses or reservoirs of a port see *The Roumanian*, 1 B. and C.P.C. 75 and 537, and other cases discussed in Garner, *Prize Law*, Nos. 148-155. See also Baty, pp. 337-343.

Different is the question of the capture of enemy vessels on inland lakes not connected with, and navigable from, the sea; see *In re Craft captured on Victoria Nyanza* [1919] P. 83, 3 B. and C.P.C. 295, where it was held that the right of capture can be exercised on such large inland lakes as belong in part to the territory of each belligerent, both having armed vessels thereon.

As to vessels beached to avoid capture, and vessels sent inland by train, see *The Anichab* [1919] P. 329; 3 B. and C.P.C. 611; [1922] 1 A.C. 235; 3 B. and C.P.C. 993.

See generally Hudson in *A.J.*, xvi. (1922) pp. 375-390.

<sup>3</sup> But not, of course, in territorial waters of neutral States; see *The De Fortuyn* (1760) Burrell 175; *The Bangor* (1916) 2 B. and C.P.C. 206; *The Düsseldorf* [1920] A.C. 1034; 3 B. and C.P.C. 664; *The Valeria* [1921] 1 A.C. 477; 3 B. and C.P.C. 834; *The Pellworm* [1922] 1 A.C. 292; 3 B. and C.P.C. 1053. But see *The Tinos*, above, § 71 (n.), and *The Ekaterinoslav* and *The Mukdem*, below, § 320 (n.).

course, defend <sup>1</sup> herself by a counter-attack. Enemy merchantmen <sup>2</sup> may be attacked only if they refuse to submit to visit after having been duly signalled to do so.<sup>3</sup> No duty exists for an enemy merchantman to submit to visit; on the contrary, she may refuse, and defend herself against an attack.<sup>4</sup> But only a man-of-war is competent to attack either men-of-war or merchantmen, in a war between parties to the Declaration of Paris, by which privateering is prohibited. Any merchantman of a belligerent attacking a public or private vessel of the enemy would be considered a pirate and treated as such, and the members of the crew would be liable to be treated as war criminals <sup>5</sup> to the same extent as private individuals committing hostilities in land warfare. However, if attacked by an enemy vessel, a merchantman is competent to deliver a counter-attack, and need not discontinue her attack because the vessel which opened hostilities takes to flight, but may pursue and seize her.

Moreover, if merchantmen must expect to be attacked without warning by a lawless enemy, they need not wait for attack before they themselves resort to hostilities. Thus,

<sup>1</sup> See above, § 85. That a merchant-vessel could defend herself against an attack of an enemy man-of-war had formerly never been doubted. But see Schramm, p. 308, who asserts that self-defence is not admissible.

<sup>2</sup> The term 'enemy merchantman' is here to be taken in its wider sense, in which it is identical with 'private vessels.' There ought, therefore, to be no doubt that yachts may be captured as well as other private vessels, although Wehberg, p. 177, denies this. See the German case of *The Primavera*, 44 Clunet (1917), p. 1804.

<sup>3</sup> This rule is, of course, valid also with regard to attacks by submarines. On the practice of German and Austrian submarines during the World War see below, § 194a. By Article 6 of the proposed Rules for the Control of Radio in Time of War (Cmd. 2201 of 1924; *A.J.*, xvii. (1923), Suppl., pp. 242-245), 'the transmission by radio

by a vessel or an aircraft, whether enemy or neutral, when on or over the high seas, of military intelligence for the immediate use of a belligerent is to be deemed a hostile act, and will render the vessel or aircraft liable to be fired upon.' And see Rodgers in *A.J.*, xvii. (1923) pp. 629-640.

<sup>4</sup> This is the British view, which is also, it is believed, the American and the Italian view. See also the *Annuaire*, xxvi. (1913) pp. 516-520. But some at any rate of the German writers consider resistance unlawful: see Liszt, § 65, A, v., and Triepel in *Z.V.*, viii. (1914) p. 378. Contrast Wehberg, *Das Seekriegsrecht*, p. 285, cited by Higgins, *Defensively Armed Merchant-ships* (1917), p. 25. On the whole question see Grau in *Strupp, Wört.*, i. pp. 505-511, and note to § 181a, below.

<sup>5</sup> See above, § 85, and below, § 254.

when in 1915, during the World War, Germany resorted to her nefarious submarine practice, and merchantmen were torpedoed without warning, or, if they were warned, their crews were endangered in their lives by being put in life-boats on the high seas, it was perfectly legitimate for merchantmen of the Allies to attempt to ram German submarines, even if signalled to stop and submit to visitation. The conviction and execution by the Germans, in July 1916, of Captain Fryatt,<sup>1</sup> the commander of the *Brussels*, for having attempted in March 1915 to ram the German submarine U 33, was nothing else than a judicial murder.

An attack upon an enemy vessel on the sea by forces on the shore—for instance, by coast batteries—is only permissible if the vessel is an enemy man-of-war. Enemy merchantmen may not be attacked in this way; for they may only be attacked by men-of-war after having been signalled in vain to submit to visit.

Defen-  
sively  
Armed

Merchant-  
Vessels.

§ 181a. In 1913 the British Admiralty announced that in the event of war it was their intention to supply British merchant-vessels with guns and ammunition for the purpose of defending themselves,<sup>2</sup> thus reviving the former practice by which merchant-vessels always carried defensive armament. In making that announcement the British Government insisted on the clear distinction between converted armed merchant cruisers<sup>3</sup> and defensively armed merchantmen. The methods of submarine warfare adopted by the Central Powers in the World War called for the execution of this policy, and accordingly it became the practice of the Allied Powers in that war to arm their

<sup>1</sup> See Scott in *A.J.*, x. (1916) pp. 865-877. For an attempt to justify the conviction and execution of Captain Fryatt see Jerusalem in *Z.V.*, xi. (1918) pp. 563-585. See also Bellot, *Grotius Society*, vii. (1922) pp. 43-57, who prefers to rest the case 'on an undoubted right to attack than on the doubtful theory of offensive-defensive'; see above, § 85 (n.). Some German writers condemned the execution of Captain Fryatt; for instance, Rocholl in *Strupp, Wört.*, i. pp. 351-353, where

detailed reference to the literature will be found, and Hatschek, p. 206.

<sup>2</sup> For the German opposition to the legality of this practice see *Annuaire*, xxvi. (1913) pp. 516-521, and Garner, i. §§ 254-260.

<sup>3</sup> See above, § 84, p. 210. Borchard and Lage, *Neutrality for the United States* (1937), p. 93, refer to that distinction as being a subtle one, but there is no sufficient justification for that description of a well-established classification.

merchant-vessels defensively and so enable them more effectively to exercise their right, as above stated,<sup>1</sup> of resisting attack by force. An overwhelming weight of authority recognised that their defensive armament in no way altered the legal status of these vessels.<sup>2</sup>

At the same time, it is clear that the arming of merchant-vessels raises problems of substantial difficulty. In the first place, it is not easy to draw a line of distinction between defensive and offensive acts. Secondly, the encouragement of even defensive hostilities on the part of private vessels is fraught with danger inasmuch as it threatens to undermine the abolition of privateering by the Declaration of Paris of 1856 between commissioned and non-commissioned vessels. Thirdly, the fact that a merchantman is armed and that she is entitled to resist actual or anticipated attack makes it impossible for enemy submarines to exercise their right of visit and capture in accordance with International Law without running the risk of destruction by the superior armament of the merchant-vessel or by being rammed by her.

It has been rightly suggested that the obvious consequence of the inability of submarines to exercise the customary rights of visit and capture in relation to defensively armed merchantmen in accordance with International Law is abstention from activities prohibited by the law.<sup>3</sup> The

<sup>1</sup> See above, § 181.

<sup>2</sup> See below, § 333a. See also Higgins's summary in Hall, § 182, and literature there cited, particularly Higgins's *Defensively Armed Merchant-ships and Submarine Warfare* (1917) (reprinted, with some alterations, in his *Studies in International Law* (1928), pp. 239-304), and Hyde, ii. §§ 709, 742-743, 745. For the German view see Scheurer, *Bewaffnete Handelsschiffe im Weltkrieg* (1919), Plaga, *Das bewaffnete Handelsschiff* (1939), and references in Higgins, *Defensively Armed Merchant-ships*, at p. 10, Hyde, ii. § 709 (n.), and Garner, i. §§ 254-260. *Against* the right of defensive armament: Triepel in *Z.V.*, viii. (1914) pp. 378-486; Liszt, §§ 62, ii. 3 and 65, A, v.; Strupp, *Grundzüge*, pp. 215, 216; Kunz, p. 118. *In favour* of the right of defensive armament: Niemeyer in

*Annuaire*, xxvi. (1913) p. 519; Wehberg, *Seekriegsrecht* (1915), p. 284; Hatschek, p. 205; and Grau in *Strupp, Wört.*, i. pp. 505-519. See also Vidaud, *Les navires de commerce armés pour leur défense* (1936). Borchart and Lage, *Neutrality for the United States* (1937), p. 87, while not denying the right of defensive armament, maintain that as the result of such armament the vessel loses her right to immunities as a merchant-vessel. A careful reading of the decision of Chief Justice Marshall in *The Nereide* (1815), 9 Cranch 388, does not support this view which, however, seems to be shared by Hyde, ii. p. 403.

<sup>3</sup> See, e.g., Pearce Higgins, *Studies in International Law* (1928), p. 294. This was also the view expressed by the United States in March 1916, although early in that year they propounded suggestions for abandoning the right

novelty of a weapon does not by itself carry with it a legitimate claim to a change in the existing rules of war.<sup>1</sup> The same principle applies with regard to capture and attack by aircraft in relation to merchantmen.<sup>2</sup>

On the other hand, practice shows that International Law must adapt itself to the changes necessitated by the advent of new weapons so long as such adaptation is not inconsistent with the fundamental rules of warfare and, in particular, with the distinction between combatants and non-combatants. A solution of the difficulty might be found in a conventional restriction of the activities of submarines (and, possibly, of converted merchantmen and of aircraft) in exchange for the abandonment of the right to arm merchantmen in defence. Such restriction might consist either in the total abolition of the right to destroy merchant-vessels on the ground of carriage of contraband, or in its limitation to certain areas in close proximity to coasts subject always to compliance with the rules ensuring the safety of crews and passengers.<sup>3</sup> Pending any such agreement it is fully consistent with the fundamental principles of the law of war to assert that merchant-vessels, defensively armed for the purpose of resisting attack, do not lose either their character as merchant-vessels or the concomitant right to be treated as such both by the enemy and by neutrals. In relation to the enemy<sup>4</sup> such right includes immunity both from direct attack and from destruction unaccompanied by the necessary safeguards for the safety of the passengers and the crew.<sup>5</sup> The violation of these

of defensive armament (in consideration of a clear obligation of the enemy not to sink merchantmen without warning) on the ground that the use of the submarine had effected a radical change in the situation. For a lucid account of these proposals see Hyde, ii. pp. 466-472.

<sup>1</sup> See below, p. 415, as to aerial bombardment.

<sup>2</sup> See below, § 214g.

<sup>3</sup> See below, § 194a.

<sup>4</sup> As to admission to neutral ports see below, § 333a.

<sup>5</sup> It has been suggested that the right of merchant-vessels to defensive

armament coupled with immunity from direct attack is due, historically, to the fact that although so armed they constituted no source of danger to the ordinary surface vessel, and that the advent of the submarine has vitally affected the position: see, e.g., Hyde, ii. p. 469. Probably that immunity is due to the more fundamental reason of immunity of non-combatants—a status which is not lost by the fact of the possession of weapons of defence. For a suggestion by a German writer that enemy merchant-ships should be fully armed and that belligerent naval and air forces

principles by the Central Powers during the World War led in turn to an increased practice of arming merchantmen. It was also one of the principal reasons for the measures of reprisals which affected drastically the law of maritime war. The war which broke out with Germany in 1939 brought a repetition both of the disregard of the non-combatant character of defensively armed merchantmen and of the resulting measures of retaliation.<sup>1</sup>

§ 182. One mode of attack which was in use in the time of sailing-ships, namely, boarding and fighting the crew, which can be described as analogous to assault in land warfare, is no longer common; but it is perfectly lawful. Attack is nowadays generally effected by cannonade, torpedoes,<sup>2</sup> and, if opportunity arises, by ramming; and except in so far as the Hague Declaration which prohibits such attacks by aircraft is binding,<sup>3</sup> nothing forbids an attack on enemy vessels by launching projectiles and explosives from air-vessels.<sup>4</sup> In case the attacked vessel not only takes to flight, but defends herself by a counter-attack, all modes of attack are lawful against her, just as she herself is justified in applying all modes of attack by way of defence.

§ 182a. The extensive use of mines by both parties in the Russo-Japanese War during the blockade of Port Arthur in 1904 showed that a regulation of the recourse of that weapon was necessary for the protection both of neutral commerce on the high seas and of the principle that merchantmen are entitled to immunity from attack without warning. To provide a measure of such regulation was the object of Hague Convention No. VIII. relative to the Laying

Attack,  
how  
effected.

Sub-  
marine  
Contact  
Mines.

should be entitled to sink such merchant-ships at sight without providing for the safety of the crew see Martini, *Reformvorschlge zum Seekriegsrecht* (1933); and see, for a refutation of this thesis, Gariel, *Une nouvelle thorie allemande du droit de la guerre maritime* (1936). Article 2 (2) of the French Naval Instructions of 1934 provides expressly that merchant-vessels must not be attacked for the

sole reason that they are armed defensively.

<sup>1</sup> See below, p. 655.

<sup>2</sup> Article 1 of Hague Convention VIII. prohibits the use of torpedoes which do not become harmless if they miss their mark.

<sup>3</sup> See above, § 114, and below, § 214a.

<sup>4</sup> Upon aircraft operations against merchant-vessels see below, § 214g.

of Automatic Submarine Contact Mines.<sup>1</sup> While no difficulty was experienced with regard to so-called electro-contact mines controlled from the shore and presenting no danger to neutrals, no complete agreement could be reached in the matter of automatic contact mines, both anchored and unanchored, which explode as the result of a blow received from a passing ship.<sup>2</sup> Great Britain proposed that the use of unanchored mines should be totally prohibited. Germany and some other States objected to that proposal on the ground that mines constitute a proper means of defence, especially in relation to a pursuing enemy. Neither was there unqualified support for the British proposal to prohibit the use of mines for the purpose of establishing or maintaining a commercial blockade. The result was a compromise which, while imposing substantial limitations upon the use of mines, sanctioned their continued use in a way which was bound to prove prejudicial both to the security of neutral shipping and to the recognised measure of immunity of merchant-vessels. For this reason Great Britain (including the Dominions) signed and ratified the Convention subject to the reservation that the mere fact that it did not prohibit a particular act or proceeding must not be held to debar her from contesting its legitimacy.<sup>3</sup>

The Convention prohibits belligerents<sup>4</sup> from laying *unanchored* automatic contact mines unless they are so constructed as to become harmless one hour at most after those who laid them lose control over them. It also forbids the laying of *anchored* automatic contact mines which do not become harmless as soon as they break loose from their

<sup>1</sup> See Lawrence, *War*, pp. 93-111; Wetzstein, *Die Seeminenfrage im Völkerrecht* (1909); Rocholl, *Die Frage der Minen im Seekrieg* (1910); Barclay, *Problems*, pp. 59 and 158; Lémonon, pp. 472-502; Higgins, pp. 328-345; Boidin, pp. 216-235; Dupuis, *Guerre*, Nos. 331-358; Scott, *Conferences*, pp. 576-587; Martitz in the *Report of the 23rd Conference* (1906) of the *International Law Association*, pp. 47-74; Stockton in *A.J.*, ii. (1908) pp. 276-284; Wehberg, § 5; Rolin, §§ 635-658; Mérign-

hac-Lémonon, ii. pp. 50-64; Hyde, ii. §§ 713-719; Kunz, pp. 126-129—Genet, §§ 93-100; Rocholl in *Strupp, Wört.*, ii. pp. 47-52.

<sup>2</sup> In the course of the war which broke out in 1939 Germany brought into use so-called electro-magnetic mines which exploded without actual contact with the passing vessel.

<sup>3</sup> The Convention is now binding upon twenty-nine States.

<sup>4</sup> As regards neutrals see below, § 363a.

moorings (Article 1). Thirdly, the Convention prohibits belligerents from laying automatic contact mines off the coasts and ports of the enemy with the sole object of intercepting commercial navigation (Article 2).<sup>1</sup> The latter provision was of limited value inasmuch as it left it open to the belligerent to maintain that mines were laid off the coast and ports of the enemy for a purpose other than merely intercepting commercial navigation. Similarly, a large measure of discretion was left to the belligerent with regard to Article 3 of the Convention, which laid down : (a) that when automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping ; (b) that belligerents must do their utmost to render such mines harmless within a limited time, and that should the mines cease to be under observation, to notify the danger zones as soon as military exigencies permit by a notice addressed to shipowners and to the Governments concerned. However, the limitations introduced by the Convention were of a substantial nature in so far as they enjoined respect for the safety of peaceful navigation, coupled with the duty of notification, and in so far as they provided safeguards against the unrestricted use of mines, both anchored and unanchored. The provisions of the Convention were disregarded by Germany in the World War and in the war which broke out in 1939 ; in the latter Germany used aircraft on a large scale for the purpose of laying mines. These violations were in both cases answered by reprisals in the form of the establishment of war zones and permanent mine-fields <sup>2</sup> as well as of extended measures

<sup>1</sup> Germany and France entered a reservation against this article.

<sup>2</sup> The Institute of International Law studied the matter at its meetings at Paris in 1910 and at Madrid in 1911, and produced a 'Réglementation internationale de l'usage des mines sous-marines et torpilles,' and at Oxford in 1913 it adopted five articles dealing with the problem in its *Manuel de guerre maritime*. See *Annuaire*, xxiv. (1911) p. 301, and xxvi. (1913) pp. 40-42. On August 23, 1914, the British Admiralty announced that 'the Germans are con-

tinuing their practice of scattering mines indiscriminately upon the ordinary trade routes. These mines do not become harmless after a certain number of hours ; they are not laid in connection with any definite military scheme . . . but appear to be scattered on the chance of touching individual British war or merchant-vessels.' Great Britain did not pursue this policy, but on October 2, 1914, announced a system of mine-fields in certain notified areas. As the war proceeded, Germany planted mines on other trade routes. Great Britain



of economic warfare aiming at achieving in the long run an effect identical in kind with that attempted by the illegal measures of the enemy.<sup>1</sup>

Duty of  
giving  
Quarter.

§ 183. As soon as an attacked or counter-attacked vessel hauls down her flag and, therefore,<sup>2</sup> signals that she is ready to surrender, she must be given quarter and seized without further firing. To continue an attack although she is ready to surrender, and to sink the vessel and her crew, would constitute a violation of customary International Law, and would only, as an exception, be admissible in case of imperative necessity or of reprisals.

Seizure.

§ 184. Seizure is effected by securing possession of the vessel through the captor sending an officer and some of his own crew on board. But if, for any reason, this is impracticable, the captor orders the captured vessel to lower her flag and to steer according to his orders. Seizure of the vessel includes seizure of all the goods thereon, although neutral merchandise will be restored by the Prize Court to its owner, as will usually also personal effects<sup>3</sup> of the captain, crew, and enemy passengers.

If a town is occupied after capitulation, and merchantmen owned by enemy subjects resident in that town are found in its port, they must not be seized, according to British practice,<sup>4</sup> although they may by American<sup>5</sup> practice.

Effect of  
Seizure.

§ 185. The effect of seizure differs in the case of private enemy vessels and public enemy vessels.

Seizure of *private* enemy vessels may be described as parallel to occupation of enemy territory in land warfare. Since the vessel, and the individuals and goods thereon, are actually placed under the captor's authority, her officers

established other notified mine-fields (see details in Garner, i. §§ 214-215, 220-222). As to the laying of mine-fields in 1939 and 1940 and as to War Zones see below, § 319a.

<sup>1</sup> See below, p. 655.

<sup>2</sup> The Privy Council has held that hauling down a flag is not an unequivocal act of submission and does not necessarily indicate that capture is complete (*The Pellworm* [1922] 1 A.C. 292; 3 B. and C.P.C. 1053, where the essentials of capture are

discussed at length).

<sup>3</sup> See Westlake, ii. pp. 154-155, especially with regard to the so-called 'adventures' (*pacotilles*), small parcels of merchandise which a captain is allowed to carry on his own account.

<sup>4</sup> *The Ships taken at Genoa* (1803) 4 C. Rob. 388.

<sup>5</sup> *Herrera v. United States and Diaz v. United States* (1912) 222 U.S. 558, 574. See Kingsbury in *A.J.*, vi. (1912) pp. 650-658.

and crew, and any private individuals on board, are for the time being submitted to the discipline of the captor, just as private individuals on occupied enemy territory are submitted to the authority of the occupant.<sup>1</sup> Seizure of private enemy vessels does not, however, vest the property finally in the hands of the belligerent<sup>2</sup> whose forces effected the capture. The prize has to be brought before a Prize Court, which, by confirming the capture through adjudication of the prize, makes the appropriation by the capturing belligerent final.<sup>3</sup>

On the other hand, the effect of seizure of *public* enemy vessels is their immediate and final appropriation.<sup>4</sup> They

<sup>1</sup> Concerning the ultimate fate of the crew see above, § 85.

<sup>2</sup> See Article 112 of the *Oxford Manual*, 1913. For a decision to the contrary see *Reinhold v. Belgian State*, decided by the Court of Appeal of Brussels: *Annual Digest*, 1923-1924, Case No. 247. It is asserted that a captured enemy merchantman may at once be converted by the captor into a man-of-war, but the cases of *The Ceylon* (1811) and *The Georgiana* (1814) 1 Dod. 105 and 397, which are quoted in favour of such a practice, are not decisive. See Higgins, *War and the Private Citizen* (1912), pp. 138-142, and the controversy between the British and American Governments in the matter of *The Farn* in *A.J.*, ix. (1915), Special Suppl., pp. 361-365. An interesting case arose in this connection shortly after the beginning of the World War. A detachment from the German cruiser *Emden* was landed on the British island Keeling in order to destroy there the wireless station. At the same time, however, the cruiser itself was attacked by a British man-of-war and rendered incapable. Thereupon the commander of the detachment took possession of an old private schooner, *Ayesha*, which happened to be lying in the port, armed her with machine guns, and declared her to be a German ship. When the ship arrived in Padang, a Dutch port in Sumatra, the question arose whether she was a prize or a man-of-war; in the first case she had to be interned, in the second she could leave within twenty-

four hours. After some discussion with the Dutch authorities the ship was allowed to leave. (*Strupp, Wört.*, i. pp. 102, 103.)

<sup>3</sup> *The Odessa* [1916] 1 A.C. 145; 1 B. and C.P.C. 559. See below, § 192; and Smith, *The Destruction of Merchant-ships under International Law* (1917), pp. 21-27.

The finality of the adjudication by the Prize Court refers only to the passing of property. It is not conclusive in the international sphere so as to rule out as between States a claim for damages for an illegal capture and condemnation. This principle was clearly established in the case of *The Betsey*, in the arbitrations under Article VII. of the Jay Treaty of 1794 between Great Britain and the United States. See Moore, *International Adjudications*, Modern Ser., vi. (1931) pp. 210-226, 240-263. See also *The Cysne* (award of June 1930, in the arbitration between Portugal and Germany), *Annual Digest*, 1929-1930, Case No. 287. See also the arbitral decision of October 5, 1937, in *Interocean Transportation Company v. United States: A.J.*, xxxii. (1938) p. 593. And see below, § 437.

<sup>4</sup> Nevertheless, ships of war have frequently been made the subject of proceedings for condemnation in British Prize Courts; see Higgins in *B.Y.*, 1925, pp. 103-110. They are within the terms of the commission issued to the British Prize Court on the outbreak of the World War: see below, § 192 (n.). As to American practice see Hyde, ii. § 903.

may be either taken into a port, or at once destroyed. All individuals on board become prisoners of war, although, if perchance there should be on board a private enemy individual of no importance or value to the enemy, he would probably not be kept for long in captivity, but liberated in due time.

As regards goods on captured public enemy vessels, there is no doubt that the effect of seizure is the immediate appropriation of such goods on the vessels concerned as are enemy property, and these goods may therefore be destroyed at once, if desirable. Should, however, neutral goods be on board a captured enemy public vessel, it is a moot point whether or not they share the fate of the captured ship. According to British practice they do, and are therefore confiscated, but according to American practice they do not.<sup>1</sup>

Immunity  
of Vessels  
charged  
with  
Religious,  
Scientific,  
or Philan-  
thropic  
Mission.

§ 186. Enemy vessels engaged in scientific discovery and exploration were, according to a general international usage in existence before the Second Hague Conference of 1907, granted immunity from attack and seizure in so far, and so long, as they themselves abstained from hostilities.<sup>2</sup>

The Second Hague Conference embodied this usage in a

<sup>1</sup> See, on the one hand, *The Fanny* (1814) 1 Dod. 443, and, on the other, *The Nereide* (1815), 9 Cranch 388. See also below, § 424 (n.).

<sup>2</sup> The usage grew up in the eighteenth century. In 1766, the French explorer Bougainville, who started from St. Malo with the vessels *La Boussole* and *L'Étoile* on a voyage round the world, was furnished by the British Government with safe-conducts. In 1776, Captain Cook's vessels *Resolution* and *Discovery*, sailing from Plymouth for the purpose of exploring the Pacific Ocean, were declared exempt from attack and seizure on the part of French cruisers by the French Government. Again, the French Count Lapérouse, who started on a voyage of exploration in 1785 with the vessels *Astrolabe* and *Boussole*, was secured immunity from attack and seizure. During the nineteenth century this usage became quite general, and had almost ripened into a custom; examples are the Austrian cruiser *Novara* (1859) and

the Swedish cruiser *Vega* (1878). No immunity, however, was granted to vessels charged with religious or philanthropic missions. A remarkable case occurred during the Franco-German War. In June 1871, the *Palme*, a vessel belonging to the Missionary Society of Basle, was captured by a French man-of-war, and condemned by the Prize Court of Bordeaux. The owners appealed, and the French Conseil d'État set the vessel free, not because the capture was not justified, but because equity demanded that the fact that Swiss subjects owning sea-going vessels were obliged to sail them under the flag of another State should be taken into consideration. See Rivier, ii. pp. 343-344; Dupuis, No. 158; Boeck, No. 199; and above, vol. i. § 258. See now the Barcelona Declaration of April 20, 1921, recognising the right of a State having no coast to have a maritime flag: Cmd. 1994 of 1923; *A.J.*, xviii. (1924), Suppl., pp. 167-168.

written rule, and by Article 4 of Convention XI. extended it to vessels with a religious, scientific, or philanthropic mission. The question, what is a 'philanthropic mission,' arose during the World War, when a German vessel, the *Paklat*,<sup>1</sup> requisitioned by the German authorities at Tsingtau at the outbreak of war with Japan to carry women and children to Tientsin, was captured on her way there by a cruiser, and condemned by the Hong-Kong Prize Court as not being engaged on a philanthropic mission.

The immunity is the same, whether the vessel concerned is a private or a public vessel.<sup>2</sup>

§ 187. Coast fishing-boats, in contradistinction to boats engaged in deep-sea fisheries, were, according to a general, but not universal, custom in existence during the nineteenth century, granted immunity from attack and seizure, so long, and in so far, as they were unarmed, and were innocently employed in catching and bringing in fish.<sup>3</sup> As early as the sixteenth century, treaties were concluded between single States stipulating such immunity for their fishing-boats in the time of war. But throughout the seventeenth and eighteenth centuries there were instances of a contrary practice, and Lord Stowell refused<sup>4</sup> to recognise any such exemption in strict law, although he recognised a rule of comity to that extent. Great Britain had always taken the standpoint that any immunity granted by her to fishing-boats was a relaxation<sup>5</sup> of strict right in the interests of humanity, but revocable at any moment, and that her

Immunity of Fishing Boats and Small Boats employed in Local Trade.

<sup>1</sup> (1915) 1 B. and C.P.C. 515. See also Garner, i. § 319, who discusses the case of the *Amiral Gauchaume*, a French steamer sunk by a German submarine while carrying Belgian refugees to England soon after the outbreak of the World War. The position of the many ships chartered by the Belgian Relief Commission to carry supplies for the inhabitants of the occupied territory in Belgium which were sunk by German submarines is also discussed by Garner, i. §§ 328-330; see also *The Haelen* in Verzijl, § 391; *Z.I.*, xxvii. p. 385; and *Entscheidungen*, ii. p. 177.

<sup>2</sup> See U.S. Naval War Code, Article

13. The matter is discussed at some length by Kleen, ii. § 210, pp. 503-505. Concerning the case of the English explorer Flinders, who sailed with the *Investigator* from England, but exchanged her for the *Cumberland*, which was seized in 1803 by the French at Port Louis, in Mauritius, as she was not the vessel to which a safe-conduct was given, see Lawrence, § 182.

<sup>3</sup> *The Paquete Habana* (1899) 175 U.S. 677; Scott, *Cases*, p. 12; see U.S. Naval War Code, Article 14; Japanese Prize Law, Article 35 (1).

<sup>4</sup> *The Young Jacob and Johanna* (1798) 1 C. Rob. 20.

<sup>5</sup> See Hall, § 148.

cruisers were justified in seizing enemy fishing-boats unless prevented by special instructions from the Admiralty.<sup>1</sup> But at the Second Hague Conference she altered her attitude, and agreed to the immunity, not only of fishing-vessels, but also of small boats employed in local trade. Article 3 of Convention XI. enacted that *vessels employed exclusively in coast fisheries*,<sup>2</sup> and *small boats employed in local trade*,<sup>3</sup> are, together with appliances, rigging, tackle, and cargo, exempt from capture.

The immunity of coast fishing-boats from capture was disregarded during the World War<sup>4</sup> by Germany, who sank British fishing-boats. She repeated that practice during the war in 1939 and, in addition, resorted to attacking and bombing of fishing trawlers by aircraft. In both wars the belligerents captured and interned members of the crews of military age.

It must be specially observed that boats engaged in deep-sea fisheries<sup>5</sup> and large boats engaged in local trade<sup>3</sup> do not enjoy the privilege of immunity from capture. Moreover, coast fishing-vessels, and small boats employed in local trade, lose it by taking part in hostilities, and Article 3 of Convention XI. expressly stipulates that belligerents must not take advantage of the harmless character of boats engaged in coast fisheries and in local trade, in order to use them for military purposes while preserving their peaceful appearance.

Immunity  
of Mer-  
chantmen  
at the  
Outbreak  
of War  
on their  
Voyage to  
and from  
a Belligerent's  
Port.

§ 188. Several times, at the outbreak of war, during the nineteenth century, belligerents decreed that an enemy merchantman on its voyage to one of their ports at the out-

<sup>1</sup> See Holland, *Prize Law*, § 36.

<sup>4</sup> See Garner, i. § 232.

<sup>2</sup> Not fisheries on the high seas, *The Stoer* (1916), L.I.R. v. 18.

<sup>3</sup> On the meaning of the term 'small boats employed in local trade' see *H.M. Procurator in Egypt v. Deutsches Kohlen Depot Gesellschaft* [1919] A.C. 291; 3 B. and C.P.C. 264. See also *The Maria* (1915) 1 B. and C.P.C. 259. It is a question of fact in each case. The Austrian Prize Court distinguished between *local trade* and *coasting trade* in *The Mukhbir-i-Surur*, Verzijl, § 389. See also Garner, *Prize Law*, Nos. 181-188.

<sup>5</sup> *The Berlin* (1914) 1 B. and C.P.C. 29. However, the term 'coast fisheries,' which is not defined in the Hague Convention, certainly must not be construed to mean only fisheries within the maritime belt, for fishermen engaged in so-called coast fisheries frequently fish outside territorial waters. The size and character of the boat must determine whether it is engaged in coast or in deep-sea fisheries. See also *The Stoer* (1916), L.I.R. v. 18.

break of war should not be seized at sea during its voyage to and from that port. Thus, at the outbreak of the Crimean War, Great Britain and France decreed such immunity for Russian vessels; Germany did the same with regard to French vessels in 1870,<sup>1</sup> Russia with regard to Turkish vessels in 1877, the United States with regard to Spanish vessels in 1898, and Russia and Japan with regard to each other's vessels in 1904. But there was no rule of International Law which compelled a belligerent to grant such days of grace, and it seemed probable when the second edition of this book was published that they would not be granted in future wars. There was, first, the fact that in all maritime countries numerous merchantmen were being built from special designs in order that they might quickly, at the outbreak of, or during, war, be converted into cruisers. There was, secondly, the fact that a belligerent fleet could not remain effective for long without being accompanied by a train of colliers, transport vessels, and repairing vessels; it was, therefore, of the greatest importance for a belligerent to have as many merchantmen as possible at his disposal to give such assistance to the fleet. How far that surmise was correct, so far as the World War was concerned, has already been pointed out.<sup>2</sup>

§ 189. Instances have occurred in which enemy vessels forced by stress of weather to seek refuge in a belligerent's harbour have been granted exemption from seizure.<sup>3</sup> But no rule of International Law conferring immunity from attack and seizure upon vessels in distress has come into existence, and no such rule is likely to grow up, especially in the case of men-of-war and merchantmen easily convertible into cruisers.

§ 190. According to the Hague Convention which adapted the principles of the Geneva Convention to warfare on sea,

<sup>1</sup> See, however, above, § 178.

<sup>2</sup> See above, § 102a, and Colombos, §§ 124-127.

<sup>3</sup> See Ortolan, ii. pp. 286-291; Kleen, ii. § 210, pp. 492-494. Thus, when in 1746, during war with Spain, the *Elisabeth*, a British man-of-war, was forced to take refuge in the port of Havana, she was not seized, but

was offered facilities for repairing the damage, and furnished with a safe-conduct as far as the Bermudas. Thus, further, when in 1799, during war with France, the *Diana*, a Prussian merchantman, was forced to take refuge in the port of Dunkirk and there seized, she was restored by the French Prize Court.

Vessels in Distress.

Immunity of Hospital and Cartel Ships.

hospital ships are inviolable, and therefore may be neither attacked nor seized.<sup>1</sup> The immunity of cartel ships is considered later.<sup>2</sup>

Immunity  
of Mail-  
Boats and  
of Mail-  
Bags.

§ 191. No general rule of International Law exists granting enemy mail-boats immunity from attack and seizure, and they were not granted any during the World War; but States have frequently stipulated for such immunity in the case of war, by special treaties.<sup>3</sup> Thus, for instance, Great Britain and France by Article 9 of the Postal Convention of August 30, 1890, and Great Britain and Holland by Article 7 of the Postal Convention of October 14, 1843, stipulated that all mail-boats navigating between the countries of the parties should continue to do so in time of war without impediment or molestation, until special notice was given by either party that the service was to be discontinued.

Whereas there is no general rule granting immunity from capture to enemy mail-boats, enemy *mail-bags* were, according to Article 1 of Hague Convention XI.,<sup>4</sup> to enjoy immunity, for it is there enacted that the postal correspondence of neutrals or belligerents, whether official or private in character, which may be found on board a neutral<sup>5</sup> or enemy ship at sea, is inviolable, and that, in case the ship is detained, the correspondence is to be forwarded by the captor with the least possible delay. There is only one exception to this rule: correspondence destined to, or proceeding from, a blockaded port does not enjoy immunity.

During the World War the Central Powers used the mails to disseminate propaganda literature, to forward contraband, to send securities abroad to sustain their credit, to transmit information, and to organise incendiarism and sabotage in factories in neutral countries.<sup>6</sup> These devices

<sup>1</sup> See below, §§ 204-209.

<sup>2</sup> § 225.

<sup>3</sup> See Kleen, ii. § 210, pp. 505-507. See also Baxter in *A.J.*, xxiii. (1929) pp. 519-527.

<sup>4</sup> See Hershey in *A.J.*, x. (1916) pp. 580-584, who correctly states that this Convention was not binding during the World War, because not all the belligerents were parties to it.

See also Verzijl, §§ 393-396; *Strupp, Wört.*, ii. pp. 303-307; Stael-Holstein in *R.I.*, 3rd ser., vi. (1925) pp. 369-394; Higgins in *B.Y.*, 1928, pp. 31-41; *Harvard Research* (1939), pp. 639-653.

<sup>5</sup> See below, §§ 319, 411.

<sup>6</sup> See details in Garner, ii. §§ 532-534.

assumed such proportions that the Allies proceeded to open and examine mail-bags destined for certain countries and found on neutral steamers entering British territorial waters or ports ; this action provoked protests from neutral States.<sup>1</sup> Similar protests were made in 1939 in the course of the war with Germany.<sup>2</sup> However, already in 1916 the United States conceded that the provisions of the Convention do not cover merchandise, and they admitted that stocks, bonds, coupons and similar securities, as well as money orders, cheques, drafts, notes, and other negotiable instruments are equivalent to merchandise even if forwarded by ordinary letter post. In every case the immunity from capture *at sea* granted to mail-bags does not include immunity from being censored when found on vessels which enter the territorial waters and harbours of a belligerent.<sup>3</sup>

It must also be specially observed that it is postal correspondence,<sup>4</sup> and not parcels sent by parcel post,<sup>5</sup> to which the Hague Convention (XI.) grants immunity from capture.

### III

#### APPROPRIATION AND DESTRUCTION OF ENEMY MERCHANTMEN

Hall, §§ 149-152, 171, 269—Lawrence, §§ 183-191—Westlake, ii. pp. 309-312—Phillimore, iii. §§ 345-381—Twiss, ii. §§ 72-97—Halleck, ii. pp. 389-464—Taylor, §§ 552-567—Wharton, iii. § 345—Wheaton, §§ 355-394—Hershey, Nos. 428-432—Moore, vii. §§ 1206-1214—Bluntschli, §§ 672-673—Heffter, §§ 137-138—Geffcken in *Holtzendorff*, iv. pp. 588-596—Ullmann, § 189—Fauchille, §§ 1383-1383 (6), 1396-1440—Despagnet, Nos. 670-682—Pradier-Fodéré, viii. Nos. 3179-3207—Rivier, ii. § 66—Nys, iii. pp. 695-

<sup>1</sup> For the diplomatic controversies between Great Britain and the United States of America regarding interference with mails see *Parl. Papers*, Cmd. 8173, 8223, 8261, 8294, 8438, or *A.J.*, x. (1916), *Special Suppl.*, pp. 404-426; for those with Sweden see *Parl. Papers*, Cmd. 8322; for those with Holland see *R.G.*, xxiv. (1917), *Documents*, p. 79. See also Hall, § 252.

<sup>2</sup> See Cmd. 6156.

<sup>3</sup> See Cmd. 8438, p. 4.

<sup>4</sup> If letters contain, not only cor-

respondence, but also goods, or if goods are sent by letter post, such goods, if contraband, may be confiscated; see, to the same effect, the German Supreme Prize Court in *The Koningin Regentes, Entscheidungen*, ii. 242. As to securities see *The Frederick VIII.* (1916) 2 B. and C.P.C. 395; *The Noordam* [1920] A.C. 904; 3 B. and C.P.C. 599; and Cmd. 8261, p. 4.

<sup>5</sup> As regards parcel post see *The Simla* (1915) 1 B. and C.P.C. 281, and also Cmd. 8173.



710—Calvo, iv. §§ 2294-2366, v. §§ 3004-3034—Fiore, iii. Nos. 1426-1443, and *Code*, Nos. 1715-1728—Martens, ii. §§ 125-126—Pillet, pp. 342-353—Perels, §§ 36, 55-58—Testa, pp. 147-160—Suarez, §§ 451-457—Rolin, §§ 612-619, 626-634, 674-714, 811-840—Mérignhac-Lémonon, ii. pp. 119-304—Verzijl, §§ 720-780—Hyde, ii. 747-749, 752-760, 890-903—Valin, *Traité des prises*, 2 vols. (1758-60), and *Commentaire sur l'Ordonnance de 1681*, 2 vols. (1766)—Pistoye et Duverdy, *Traité des prises maritimes*, 2 vols. (1854-1859)—Upton, *The Law of Nations affecting Commerce during War* (1863)—Boeck, Nos. 156-209, 329-380—Dupuis, Nos. 96-149, 282-301—Bernsten, § 8—Roscoe, *The Growth of English Law* (1911), pp. 92-140—Schramm, §§ 2, 13-15—Huberich and King, *German Prize Code* (1915), and *The Development of German Prize Law* (1918)—Roscoe, *History of the English Prize Court* (1924)—Navello, *L'évolution du droit de visite et du droit de prise au cours de la dernière guerre* (1925), pp. 117-145—Colombos, *Law of Prize* (1926), §§ 1-41—Garner, *Prize Law*, Nos. 1-138—Genet, §§ 226-245, 273-316—Keith's Wheaton, pp. 856-871—Marsden, *Early Prize Jurisdiction and Prize Law in England*, in the *English Historical Review*, xxiv. (1909) p. 675; xxv. (1910) p. 243; xxvi. (1911) p. 34—Jessup and Deák, *Neutrality*, vol. i: *Origins* (1935), pp. 157-200—Erle Richards in *B.Y.*, 1920-1921, pp. 11-34—Colombos in *Journal of Comparative Legislation*, 3rd ser., ii. (1920) pp. 289-297; iii. (1921) pp. 286-302—Roscoe in *B.Y.*, 1921-1922, pp. 90-98—Gaskoin, *Prize Case Notes in the Days of Stowell*, in *B.Y.*, 1923-1924, pp. 78-89—Herzog in *A.J.*, xviii. (1924) pp. 483-506—James in *University of Pennsylvania Law Review*, 75 (1927), pp. 505-526—Baty in *Law Quarterly Review*, xliii. (1927) pp. 24-52. See also the literature quoted by Fauchille at the commencement of § 1396.

Prize  
Courts.\*

§ 192. It has already been stated above<sup>1</sup> that the capture of a private enemy vessel has to be confirmed by a Prize Court, and that it is only through its adjudication that the vessel becomes finally appropriated. The origin<sup>2</sup> of Prize

<sup>1</sup> § 815. See also on Prize Courts, below, §§ 434-437.

<sup>2</sup> The following are some of the principal collections and reports of Prize Court Decisions. Great Britain: *English Prize Cases* (1745-1859) (by Roscoe); *British and Colonial Prize Cases* (1914-1922) (by Trehern and Grant) (cited as B. and C.P.C.); *Lloyd's Reports of Prize Cases* (1914-1924) (by Aspinall and De Hart) (cited as L.L.R.); Hull, *Digest of Cases decided in British Prize Courts* (1927); *Jurisprudence britannique*: (1914 et seq.) (by Fauchille and Basdevant). America: *Prize Cases decided in the United States Supreme Court*, 1789-1918 (by Scott). Germany: *Entscheidungen des Oberprisen-gerichtes in Berlin* (1913, 1921; cited as *Entscheidungen*); *Jurisprudence allemande en matière de prises mari-*

*times*: by Fauchille and Charles de Visscher (1924) (cited as Fauchille, *Jur. all.*). France: *Jurisprudence française en matière de prises maritimes* (by Fauchille, *Jur. fr.*). Italy: *Jurisprudence italienne en matière de prises maritimes* (by Fauchille and Basdevant (1918)) (cited as Fauchille, *Jur. ital.*). Russia and Japan: *Russian and Japanese Prize Cases decided in the Russo-Japanese War of 1904-1905*, 2 volumes (by Hurst and Bray, 1912-1913) (cited as Hurst). General: Verzijl, *Le droit des prises de la grande guerre* (1924) (cited as Verzijl); Garner, *Prize Law during the World War* (1927) (cited as *Prize Law*).

<sup>3</sup> See Twiss, ii. §§ 74-75; Marsden, *Documents relating to Law and Custom of the Sea* (i., 1915; ii., 1916), and the same author in the *English Historical*

Courts is to be traced back to the end of the Middle Ages. During the Middle Ages, after the Roman Empire had broken up, a state of lawlessness established itself on the high seas. Piratical vessels of the Danes covered the North Sea and the Baltic, and navigation of the Mediterranean Sea was threatened by Greek and Saracen pirates. Merchantmen, therefore, associated themselves for mutual protection, and sailed as a merchant fleet under a specially elected chief, the so-called Admiral. They also occasionally sent out a fleet of armed vessels for the purpose of sweeping pirates from certain parts of the high seas. Piratical vessels and goods which were captured were divided among the captors according to a decision of their Admiral. During the thirteenth century the maritime States of Europe themselves endeavoured to keep order on the open sea. By and by, armed vessels were obliged to be furnished with letters-patent, or letters of marque, from the sovereign of a maritime State, and their captures submitted to the official control of such State as had furnished them with their letters. A board, called the Admiralty, was instituted by maritime States, and officers of that Board of Admiralty exercised control over the armed vessels and their captures, inquiring in each case <sup>1</sup> into the authorisation of the captor, and the nationality of the captured vessel and her goods; and after modern International Law had grown up, it was a recognised customary rule that in time of war the Admiralty of maritime belligerents should be obliged to institute a court <sup>2</sup> or courts, whenever a prize was captured by public

*Review*, xxiv. (1909) p. 675, xxv. (1910) p. 243, xxvi. (1911) p. 34, and in the *Journal of Comparative Legislation*, New Ser., xv. (1915) pp. 90-94; Senior in the *Law Quarterly Review*, xxxv. (1919) pp. 73-83; Roscoe, *Studies in the History of the Admiralty and Prize Courts* (1932).

<sup>1</sup> The first case that is mentioned as having led to judicial proceedings before the Admiral in England dates from 1357; see Marsden in the *English Historical Review*, xxiv. (1909) p. 680; Roscoe, *History of the English Prize Court* (1924), p. 4.

<sup>2</sup> In England an Order in Council

dated July 20, 1589, first provided that all captures should be submitted to the High Court of Admiralty; see Marsden, *ibid.*, p. 690. After a good deal of interference by the Executive in prize matters, the British Prize Court appears to have established its final undisputed and exclusive jurisdiction about the year 1616; see Roscoe, *History of the English Prize Court* (1924), p. 18. See also, as to the history, Holdsworth, *History of English Law*, i. (1922) pp. 561-568 and Pares, *Colonial Blockade and Neutral Rights 1739-1756* (1938), pp. 77-147.

vessels or privateers, in order to decide whether the capture was lawful or not. These courts were called Prize Courts. Nowadays all maritime States either constitute permanent Prize Courts, or appoint them specially in each case of an outbreak of war. One of the objects of Prize Courts is the wish of the belligerents to be guarded by a decision of a court against claims by neutral States regarding alleged unjustified capture of neutral vessels and goods.<sup>1</sup> The capture of any private vessel, whether *prima facie* belonging to an enemy or a neutral, must, therefore, be submitted to a Prize Court. Prize Courts are not international courts, but national courts instituted by Municipal Law.<sup>2</sup> Every State is, however, bound by International Law to enact only such statutes and regulations<sup>3</sup> for its Prize Courts as are in conformity with International Law.<sup>4</sup> A State may,

<sup>1</sup> The fact that in Great Britain the Prize Courts are competent to condemn British vessels found guilty of trading with the enemy has nothing to do with International Law, but is entirely a matter of Municipal Law, just as is the question—see above, § 101—whether trading with the enemy is permitted or prohibited. But, according to British practice, British Prize Courts are likewise competent to condemn merchantmen of an ally which have been found guilty of trading with the enemy. This practice is based on the fact that—see above, § 101—British Prize Courts consider it to be a rule of International Law that trading with the enemy is *ipso facto* by the outbreak of war prohibited. See *The Panariellos* (1915) 1 B. and C.P.C. 195; 2 B. and C.P.C. 47.

<sup>2</sup> See below, § 434. By the commission issued to the British Prize Court at the outbreak of the World War, the Court was 'authorised and required to take cognisance of and judicially to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods that are or shall be taken, and to hear and determine the same; and according to the course of Admiralty and the law of nations, and the statutes, rules, and regulations for the time being in force in

that behalf, to adjudge and condemn all such ships, vessels, and goods as shall belong to the German Empire or the citizens or subjects thereof, or to any other persons inhabiting within any of the countries, territories, or dominions of the said German Empire, which shall be brought before you for trial and condemnation': see [1926] 1 K.B. at p. 93. See also *The Pomona*, the first case decided in 1939 during the war with Germany and reported in *The Times* newspaper of November 2, 1939.

<sup>3</sup> The constitution and procedure of Prize Courts in Great Britain are governed by the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), the Prize Courts Act, 1894 (57 & 58 Vict. c. 39), the Prize Courts (Procedure) Act, 1914 (4 & 5 Geo. V. c. 13), the Prize Courts Act, 1915 (5 & 6 Geo. V. c. 57), the Naval Prize (Procedure) Act, 1916 (6 Geo. V. c. 2), the Naval Prize Act, 1918 (8 & 9 Geo. V. c. 30), and the Prize Court Rules, 1914. The Institute of International Law has at various meetings occupied itself with capture, and embodied rules relating to it in Articles 100-115 of its *Manuel des lois de la guerre maritime* adopted at its meeting at Oxford in 1913 (see *Annuaire*, xxvi. pp. 667-671).

<sup>4</sup> The position of a Prize Court in relation to Municipal and Interna-

therefore, instead of making special regulations, directly order its Prize Courts to apply the rules of International Law, and it is understood that, when no statutes are enacted or regulations are given, Prize Courts have to apply International Law. Prize Courts may be instituted by belligerents in any part of their territory, or the territories of allies,<sup>1</sup> or territory under military occupation,<sup>2</sup> but not on neutral territory. It would nowadays constitute a breach of neutrality on the part of a neutral State to allow the institution on its territory of a Prize Court.<sup>3</sup>

Whereas the ordinary Prize Courts are national courts, Convention XII. of the Second Hague Conference provided for the establishment of an International<sup>4</sup> Prize Court at The Hague, which, in certain matters, was to serve as a court of appeal in prize cases; but this Convention was never ratified.

§ 193. As soon as a vessel is seized, she must be conducted to a convenient port of adjudication. As a rule, the officer and the crew sent on board the prize by the captor will navigate her to the port. This officer may ask the master and crew of the vessel to assist him, but, if they refuse, cannot compel them. The captor need not accompany the prize to the port, except where an officer and crew cannot be sent on board, and the captured vessel is ordered to lower her flag and to steer according to orders. The captor must in that case conduct the prize to the port. To which port a prize is to be taken is not for International

Conduct  
of Prize  
to Port  
of Adjudi-  
cation.

tional Law was fully considered by the Privy Council during the World War in *The Zamora* [1916] 2 A.C. 77; 2 B. and C.P.C. 1; the net effect of this decision is that a British Prize Court would be bound by an Act of Parliament even if it conflicted with International Law, but is not bound by an Order in Council which is at variance with International Law, except where the Order directs a mitigation of the belligerent rights of the British Crown; with this addition, that the Court is conclusively bound by a statement in an Order to the effect that a case for reprisals (see below, § 319) exists. For a criticism

of this decision see Holdsworth, *History of English Law*, i. (1922) pp. 566-567. See also Garner, *Prize Law*, Nos. 103-138.

<sup>1</sup> *The Christopher* (1799) 2 C. Rob. 210.

<sup>2</sup> *The Sudmark* (No. 2) [1918] A.C. 475; 3 B. and C.P.C. 73 (Alexandria under British occupation).

<sup>3</sup> See below, § 327, and Article 1 of Convention XIII. of the Second Hague Conference; *The Polka* (1854), Spinks 57 (condemnation of a prize lying in a neutral port), is an exceptional case.

<sup>4</sup> See below, §§ 438-447a.

Law to determine ; it only provides that the prize must be taken straight to a convenient <sup>1</sup> port of adjudication, and only in case of distress or necessity is delay allowed. A prize may, in case of distress, or in case she is in such bad condition as prevents her from being taken to such a port, if the neutral State concerned gives permission,<sup>2</sup> be taken to a near neutral port, and in that event the capturing man-of-war as well as the prize enjoys there the privilege of extritoriality. But as soon as circumstances allow, the prize must be conducted from the neutral port to a convenient port of adjudication, and only if the condition of the prize makes this absolutely impossible may the Prize Court give its verdict in its absence after hearing proper evidence.

The whole crew and cargo ought, as a rule, to remain on board the prize until they reach the port of adjudication. But if any cargo is in a condition which prevents it from being sent there, it may, according to the needs of the case, either be destroyed or sold in the nearest port, and, if sold, an account of the proceeds has to be sent to the Prize Court. This applies also to neutral goods, although they must, according to the Declaration of Paris, be restored to their neutral owners, unless contraband.

Destruction of Prize.

§ 194. Since through adjudication by the Prize Courts the ownership of captured private enemy vessels becomes finally transferred to the belligerent whose forces made the capture, it is evident that after transfer the captured vessel as well as her cargo may be destroyed. On the other hand, it is likewise evident that, since a judgment of a Prize Court is necessary before the appropriation of the prize becomes final, a captured merchantman must not, as a rule, be destroyed <sup>3</sup> on capture instead of being conducted to the port of adjudication. There are, however, exceptions to the rule, but no unanimity exists in theory or practice as regards those exceptions. Whereas some States and writers <sup>4</sup>

<sup>1</sup> *The Südmark* (No. 2), *supra*, and Holland, *Prize Law*, § 278.

<sup>2</sup> See below, § 328, and Articles 21-23 of Convention XIII. of the Second Hague Conference.

<sup>3</sup> See Smith, *The Destruction of Merchant-ships under International Law* (1917), pp. 27-54.

<sup>4</sup> See, for instance, Bluntschli, § 672.

consider the destruction of a prize allowable only in case of imperative necessity, others<sup>1</sup> allow it in nearly every case of convenience. Thus, the Government of the United States of America, on the outbreak of war with England in 1812, instructed the commanders of American vessels to destroy at once all captures, the very valuable excepted, because a single cruiser, however successful, could man a few prizes only, but by destroying each capture would be able to continue capturing, and thereby constantly diminish the enemy merchant fleet.<sup>2</sup> During the Civil War in America, the cruisers of the Southern Confederate States destroyed all enemy prizes, because there was no port open for them to bring prizes to. During the Russo-Japanese War, Russian cruisers destroyed twenty-one captured Japanese merchantmen.<sup>3</sup> According to British practice,<sup>4</sup> the captor is allowed to destroy the prize in only two cases—namely, first, when the prize is in such a condition as prevents her from being sent to any port of adjudication<sup>5</sup>; and, secondly, when the capturing vessel is unable to spare a prize crew to navigate the prize into such a port.<sup>6</sup> Be that as it may,<sup>7</sup> in every case of destruction of a prize the captor must remove crew, ship's papers, and, if possible, the cargo, beforehand, and must afterwards send crew, papers, and cargo to a port of adjudication for the purpose of satisfying the Prize Court that both the capture and the destruction were lawful.

<sup>1</sup> See, for instance, Martens, ii. § 126, who moreover makes no difference between the prize being an enemy or a neutral ship.

<sup>2</sup> U.S. Naval War Code (Article 14) allowed destruction 'in case of military or other necessity.' As to American practice see Hyde, ii. § 756.

<sup>3</sup> See Takahashi, pp. 284-310.

<sup>4</sup> *The Acteon* (1815) 2 Dod. 48; *The Felicity* (1819) 2 Dod. 381; *The Leucade* (1855) Spinks, 217. See also Holland, *Prize Law*, §§ 303-304.

<sup>5</sup> *The Valeria* [1921] 1 A.C. 477; 3 B. and C.P.C. 644.

<sup>6</sup> *The Stoer* (1916) LL.R. v. 18. The *Manuel des lois de la guerre maritime* of the Institute of International Law has suggested for the consideration

of the States in Article 104 a rule prohibiting destruction of a captured enemy merchantman except 'in face of exceptional necessity, i.e. when necessary to secure the safety of the vessel making the capture or the success of the operations of war in which it is at the time engaged.' See *Annuaire*, xxvi. p. 669.

<sup>7</sup> The whole matter is thoroughly discussed by Boeck, Nos. 268-285; Dupuis, Nos. 262-268; and Calvo, v. §§ 3028-3034. As regards destruction of a neutral prize see below, § 431. And see *Costomenis v. Germany* (decided in February 1929, by the Greco-German Mixed Arbitral Tribunal), *Annual Digest*, 1929-1930, Case No. 302.

If destruction of a captured enemy merchantman can, as an exception, be lawful, there arises the further question of compensation for the neutral owners of goods on board.<sup>1</sup> If the destruction of the vessel herself was lawful, and if it was not possible to remove her cargo, no compensation need be paid.<sup>2</sup> An illustrative case happened during the Franco-German War. On October 21, 1870, the French cruiser *Desaix* seized two German merchantmen, the *Ludwig* and the *Vorwärts*, but burned them because she could not spare a prize crew to navigate the prizes into a French port. The neutral owners of part of the cargo claimed compensation, but the French Conseil d'État refused to grant indemnities on the ground that the action of the captor was lawful.<sup>3</sup> A similar decision was given by the Hamburg Prize Court in 1915 during the World War. The *Glitra* was an English merchantman captured by a German submarine, and then sunk, because she could not be brought into a German port. The Norwegian owners of the cargo claimed compensation, but the Prize Court refused to grant it, on the ground that the sinking was lawful.<sup>4</sup>

Destruction of Prizes by Submarines.

§ 194a. The question of the destruction of prizes has become of particular importance through the use of submarines.<sup>5</sup> There is not the slightest doubt that submarines are entitled to exercise the right of visit and search over

<sup>1</sup> See Wright in *A.J.*, xi. (1917) pp. 358-379.

<sup>2</sup> Wehberg, p. 295, and Smith, *op. cit.*, pp. 54-58, object to this statement; but Nöldeke in *Z.V.*, ix. (1916) pp. 447-458, approves of it.

<sup>3</sup> See Boeck, No. 146; Barboux, pp. 53, 155; Calvo, v. § 3033; Dupuis, No. 262; Hall, § 269; Westlake, ii. p. 309. See also Article 3 of unratified Hague Convention XII.

<sup>4</sup> *Entscheidungen*, i. 34; Fauchille, *Jur. all.*, 25; see also *The Indian Prince*, *A.J.*, x. (1916) pp. 930-935; *Entscheidungen*, i. 87; Fauchille, *Jur. all.*, 69; and *The Kaipara*, *Entscheidungen*, i. 288; Fauchille, *Jur. all.*, 213. For a criticism of this decision see Garner, *Verzijl in Grotius Annuaire*, 1917, p. 71.

<sup>5</sup> On this question see Garner, i.

§§ 228-243; *A.J.*, ix. (1915) pp. 666-680; Minor in the *Proceedings of the American Society of International Law*, x. (1916) pp. 51-60; Hyde, *ibid.*, xi. (1917) pp. 26-35; Kunz, pp. 129-135; Perrinjaquet in *R.G.*, xxiv. (1917) pp. 117-203; Higgins in *B.Y.*, 1920-1921, pp. 149-165; *Grotius Society*, iv. (1919) pp. xxxi.-l.; Hyde, ii. §§ 747-749; Cruchaga, §§ 1078-1128; *Report of the Committee on the Legal Status of Submarines*, published in *Grotius Society*, xiv. (1929) pp. 155-174; Tréville, *Essai sur l'histoire et la situation du sous-marin en droit international* (1931); Mori, *The Submarine in War* (1931); Bauer, *Das Unterseeboot* (1931); Renault, *Le sous-marin et sa situation dans le droit des gens* (1932), pp. 1-83, 125-165; Louvard, *La guerre sous-marine au commerce* (1934); *Harvard Research* (1939), pp. 548-555.

enemy merchantmen, and capture them. But a submarine can never spare a prize crew to navigate a prize into any port of adjudication, nor is there any room in a submarine to take on board the crew of the prize. For this reason the opinion is widely held that a submarine may never destroy a captured merchantmen. But the practice of the Central Powers during the World War was very different. German submarines, even before the general order to torpedo without warning all enemy merchantmen within the war area proclaimed by Germany around the British Isles, destroyed several of their English prizes, after having given ten minutes to the crews to lower their boats and leave the ship. Although in these cases no lives were lost, because the crews were either picked up by passing vessels or otherwise reached the shore, they were exposed to considerable danger. After February 1915, German submarines frequently torpedoed both enemy and neutral merchantmen, and great loss of life was caused thereby. The most appalling case was that of the *Lusitania*, a transatlantic liner, which was torpedoed on May 7, 1915, near the coast of Ireland and over 1100 non-combatant men, women, and children perished. Unfortunately, however, this was but one of many.<sup>1</sup>

The abortive Treaty of Washington of 1922,<sup>2</sup> made 'to

<sup>1</sup> The following are some of the judicial and arbitral decisions arising out of the sinking of this ship: *The Lusitania* (1918) 251 Fed. 715; Scott, *Cases*, pp. 784-790; *Vanderbilt v. Travelers Insurance Co.*, Supreme Court of New York, 1920, in *A.J.*, xvii. (1923) pp. 578-581; *Mixed Claims Commission, Opinions in the Lusitania Cases*, in *A.J.*, xviii. (1924) pp. 361-373; xix. (1925) pp. 593-609, 630-633, 803-809; xx. (1926) pp. 595-601; Borchard in *A.J.*, xix. (1925) pp. 133-143; xx. (1926) pp. 69-75. See also Hyde, ii. §§ 747-749. Germany admitted liability to pay compensation for the loss of life of American citizens in a diplomatic note of February 4, 1916. For German views of the sinking of the *Lusitania* see Meurer, *Der Lusitania-Fall* (1915); Fleischmann in Liszt, § 64 B, note 11, who justifies the sinking on the ground of entry into the *Sperrgebiet* after

warning; *Strupp, Wört.*, i. pp. 851-857, where it is justified on the ground of reprisals; Lützow, *Der Lusitania-Fall* (1921); Bruns in *Z.d.V.*, vi. (1936) pp. 590-593; other literature cited in Liszt, *supra*. See also Borchard and Lage, *Neutrality for the United States* (1937) pp. 140-169.

<sup>2</sup> Cmd. 1627; *A.J.*, xvi. (1922), Suppl., pp. 57-60. For a criticism of the Washington Rules see Spaight, *Commerce*, pp. 42-44, and Mérignhac in *R.G.*, xxix. (1922), at pp. 136-146. The Treaty has not been ratified by any of the signatories. As to the question of submarines at the Washington Conference, see Diena in *Rivista*, 3rd ser., i. (1921-1922) pp. 465-471; François in *R.G.*, xxx. (1923) pp. 34-50; Roxburgh in *B.Y.*, 1922-1923, pp. 150-158; Discussion in *Grotius Society*, xi. (1926) pp. 65-78.



protect neutrals and non-combatants at sea in time of war,' prescribed rules concerning the attack upon and sinking of merchant-vessels by submarines. At the same time it recognised the practical impossibility of using submarines as commerce destroyers without violating the generally recognised rules of International Law on the matter, and prohibited altogether their use for that purpose. The London Naval Treaty of 1930 between the United States, Great Britain, France, Italy,<sup>1</sup> and Japan, laid down in Part IV. (Article 22) that, in their action with regard to merchant-ships, submarines must conform to the established rules of International Law to which surface vessels are subject; that, in particular, 'except in case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant-vessel without having first placed passengers, crew, and ship's papers in a place of safety'; and that for this purpose the ship's boats can be regarded as a place of safety only if the safety of the passengers and crew is assured, having regard to the conditions of the weather and the sea, the proximity of land, or the presence of another vessel able to take them on board.<sup>2</sup> That part of the Treaty must be deemed to be declaratory of International Law as it existed prior to its conclusion. It was laid down in the Treaty that it shall remain in force without time limit (Article 23).<sup>3</sup> Accordingly, when the Treaty of 1930 was allowed to expire on December 31, 1936, Part IV. thereof remained binding upon the Parties. However, with the view to enlarging the number of States expressly accepting the

<sup>1</sup> France and Italy have not ratified the Treaty.

<sup>2</sup> For an application of these tests, as prescribed by customary International Law, see the case of *Marouli v. Germany* (decided by the Greco-German Mixed Arbitral Tribunal on November 8, 1928), *Annual Digest*, 1927-1928, Case No. 388. See also above, p. 381, n. 7.

<sup>3</sup> For the text of the Treaty see Cmd. 3578; *Documents*, 1930, p. 12.

See also Toynbee, *Survey*, 1930, pp. 63 *et seq.*; Philipse in *R.I.*, 3rd ser., xii. (1931) pp. 85-102. See also 20-21 Geo. V. c. 48 amending the Treaties of Washington Act, 1922.

In so far as aircraft can be employed against merchant-vessels, there ought to be no doubt that it is bound to comply with the principles applicable to men-of-war and submarines. See Spaight, *Air*, pp. 470-476; Richmond, *Sea Power in the Modern World* (1934), pp. 113-115. See § 214g.

obligations in question, the United States, Great Britain (including the Dominions and India), France, Italy, and Japan signed in London, on November 6 of that year, a Protocol incorporating *verbatim* the provisions of Part IV. relating to submarines.<sup>1</sup> Provision was made for the accession of other States, such accession to be equally without a time limit. Among the many States which acceded were Germany in 1936<sup>2</sup> and Soviet Russia in 1937. When the war between the Allies and Germany broke out in September 1939 she once more embarked upon the practice of using submarines for sinking merchantmen, belligerent and neutral, in disregard of the obligations both of customary International Law and of the Protocol of 1936. That illegal practice was one of the reasons of the retaliatory measures adopted by the Allies in November 1939<sup>3</sup> and in April 1940.<sup>4</sup>

§ 195. Although prizes have, as a rule, to be brought before a Prize Court, International Law nevertheless does not forbid the ransoming of the captured vessel, either directly after the capture, or after she has been conducted to port, but before adjudication. However, the practice of accepting and paying ransom, which grew up in the sixteenth<sup>5</sup> century, is in many countries now prohibited by Municipal Law. Thus, for instance, Great Britain by § 45 of the Naval Prize Act, 1864, prohibits ransoming except when specially provided for by Order in Council. Where

Ransom  
of Prize.

<sup>1</sup> For the text see Treaty Series, No. 29 (1936); *Documents*, 1936, p. 632; *A. J.*, xxxi. (1937), Suppl., p. 137. In the preamble to the Nyon Agreement of September 1937 concerning the suppression of attacks by submarines against merchant-vessels in the course of the Spanish Civil War (Cmd. 5568), the provisions of the Treaty of 1930 and of the Protocol of 1936 were referred to, in effect, as declaratory of International Law. The Supplementary Nyon Agreement of the same month (Cmd. 5569) made the principles of the former Agreement applicable to attacks by surface vessels or aircraft.

<sup>2</sup> For a suggestion by a German writer that the provisions of the Protocol of 1936 do not apply to

attacks upon vessels in war zones (see below, § 319a) on the ground that by entering the barred zone the vessel interferes with the naval operations and that her conduct is therefore analogous to a 'persistent refusal to stop' see Schmitz in *Z. ö. V.*, viii. (1938) p. 671.

<sup>3</sup> On November 27, 1939, Great Britain, followed by France, issued a retaliatory Order in Council (see below, p. 655) on the ground, *inter alia*, that Germany had disregarded her obligations under the Protocol of 1936.

<sup>4</sup> These took the form of laying mines in limited areas of Norwegian territorial waters. See below, § 319a.

<sup>5</sup> See Senior in the *Law Quarterly Review*, xxxiv. p. 50.

ransom is accepted, a contract of ransom is made between the captor and the master of the captured vessel; the latter gives a so-called ransom bill to the former, in which he promises the amount of the ransom. He is given a copy of the ransom bill for the purpose of a safe-conduct to protect his vessel from again being captured, provided that he keeps his course to the port agreed upon in the ransom bill. To secure the payment of ransom, an officer of the captured vessel can be detained as hostage; otherwise the whole of the crew is to be liberated with the vessel, ransom being an equivalent for both the restoration of the prize and the release of her crew from captivity. So long as the ransom bill is not paid, the hostage can be kept in captivity. But it is exclusively a matter for the Municipal Law of the State concerned to determine whether or no the captor can sue upon the ransom bill, if the ransom is not voluntarily paid.<sup>1</sup> Should the capturing vessel, with the hostage or the ransom bill on board, be herself captured, the hostage is liberated, and the ransom bill loses its effect, and need not be paid.<sup>2</sup>

Loss of  
Prize,  
especially  
Recap-  
ture.

§ 196. A prize is lost—(1) when she escapes through being rescued<sup>3</sup> by her own crew, (2) when the captor intentionally abandons her, or (3) when she is recaptured.<sup>4</sup> The property in a prize which, according to International Law, vests in the belligerent whose forces made the capture, provided that a Prize Court confirms the capture, is lost when the prize is lost; and it seems to be obvious, and everywhere recognised by Municipal Law, that as soon as a captured enemy merchantman succeeds in escaping, the title of the

<sup>1</sup> See for British practice, prior to the Naval Prize Act, 1864, *Cornu v. Blackburne* (1781) 2 Doug. 640; *Anthon v. Fisher* (1782) 2 Doug. 649 (n.); *The Hoop*, 1 C. Rob. 201; Hall, § 151; and for American practice, *Goodrich and De Forest v. Gordon* (1818) 15 Johnson 6.

<sup>2</sup> The matter of ransom is discussed with great lucidity by Senior in the *Law Quarterly Review*, xxxiv. pp. 49-62; see also Twiss, ii. §§ 180-183; Boeck, Nos. 257-267; Dupuis, Nos. 269-277. As to ransom

of neutral vessels see below, § 432.

<sup>3</sup> See Gregory in *A.J.*, xi. (1917) pp. 315-326; Hall, § 152.

<sup>4</sup> For a discussion of certain cases in the Belgian Prize Court, in 1919, of condemnation of enemy ships after, and in spite of, recapture, see Higgins in *B.Y.*, 1921-1922, pp. 180-192; Clunet in 48 *Clunet* (1921), pp. 83-92, disapproved of the condemnation; and see the *Brussels* in the Belgian Prize Court in *A.J.*, xvi. (1922) pp. 127-129.

former owners revives *ipso facto*. But the case is different when a prize, whose crew have been taken on board the capturing vessel is abandoned and is afterwards met and taken possession of by a neutral vessel, or by a vessel of her home State ; in such cases it is certainly not for International Law to determine whether, or not, the original ownership revives through abandonment ; this is a matter for Municipal Law.<sup>1</sup>

The case of recapture is likewise different from escape. Here, too, Municipal Law has to determine whether, or not, the former ownership revives, since International Law only lays down the rule that by recapture the property in the vessel reverts to the belligerent whose forces made the recapture.<sup>2</sup> Municipal Law of the individual States has settled the matter in different ways. Thus for Great Britain the Naval Prize Act, 1864, in section 40, enacts that the recaptured vessel, except when she has been used by the captor as a ship of war, shall be restored to her former owner on his paying one-eighth to one-fourth of her value, as the Prize Court may award, as prize salvage, whether the recapture is made before or after the enemy Prize Court had confirmed the capture. Other States restore a recaptured vessel only when the recapture is made within twenty-four hours<sup>3</sup> after capture, or before the captured vessel is conducted into an enemy port, or before she is condemned by an enemy Prize Court.

§ 197. Through being captured, and afterwards condemned by a Prize Court, a captured enemy vessel and captured enemy goods<sup>4</sup> become, as already explained, the property of the belligerent whose forces made the capture.<sup>5</sup> But according to the Declaration of Paris, neutral goods,

Fate of Prize.

<sup>1</sup> See Hall, § 152.

<sup>2</sup> But not when the vessel after condemnation by a Prize Court has been sold to a neutral subject ; see below, § 197 ; Wehberg, p. 305 ; and Kleen, i. pp. 339, 340. See also Keith's Wheaton, pp. 871-888.

<sup>3</sup> For instance, France ; see Dupuis, Nos. 278-279 ; see Hall, § 166.

As to recapture of neutral vessels see below, § 432.

<sup>4</sup> It does not, of course, matter whether the goods concerned were captured on enemy ships or on merchantmen sailing under the flag of the capturing belligerent. See above, §§ 102, 177 (n.).

<sup>5</sup> See Herzog, *When does Title to Prize Pass ?* in *A.J.*, xviii. (1924) pp. 483-506.

contraband excepted, found on enemy ships may not be condemned. Nevertheless, all goods found on enemy vessels are presumed<sup>1</sup> to be enemy unless claimed as neutral by neutral owners; moreover, only neutral *merchandise* is exempt from confiscation, and not neutral goods other than merchandise.<sup>2</sup> Further, neutral mortgagees,<sup>3</sup> or pledgees<sup>4</sup> of enemy vessels, or enemy cargoes, have no claim to be indemnified out of the proceeds of their sale.

What becomes of the prize after condemnation is not for International Law, but for Municipal Law, to determine.<sup>5</sup> A belligerent State may hand the prize over to the captors, or keep her for itself, or sell her and divide the whole or part of the proceeds among the captors, or among members of the naval forces generally. For Great Britain the Naval Prize Act, 1918,<sup>6</sup> established a naval prize fund into which the proceeds of sale of certain prizes and prize cargoes were paid, and out of which prize money was distributed among members of the naval and marine forces.<sup>7</sup> If a neutral subject buys a captured ship after her condemnation, she may certainly not be attacked and captured by the belligerent State to a subject of which she formerly belonged; but if she is bought by an enemy subject, and afterwards captured, she may be restored<sup>8</sup> to her former owner.

Applica-  
tion of  
Prize  
Law to  
Aircraft.

§ 197a. As pointed out below in § 435a, by the British Prize Act, 1939, and the laws of some other countries mari-

<sup>1</sup> See above, § 90.

<sup>2</sup> *The Schlesien* (1914) 1 B. and C.P.C. 13. See also Garner, *Prize Law*, Nos. 271a, 272.

<sup>3</sup> *The Marie Glaeser* [1914] P. 218, 1 B. and C.P.C. 38; and the German case of *The Fenix*, Z.V., ix. (1915) p. 103, and A.J., x. (1916) p. 909.

<sup>4</sup> *The Odessa* [1916] 1 A.C. 145; 1 B. and C.P.C. 554.

<sup>5</sup> Unless the question is regulated by a special convention; see, for instance, Article 5 of the Convention of November 9, 1914, between Great Britain and France, providing for the division of the bounty in case capture is effected by joint operations. See the case of the *Souhl*,

captured in the presence of British, Italian, and Greek vessels, where the bounty was divided, R.G., xxvii. (1920), *Jurisprudence*, p. 60.

<sup>6</sup> 8 & 9 Geo. V. c. 30. As to other countries see Verzijl, §§ 124-127.

<sup>7</sup> The Act of 1918 also constituted a Naval Prize Tribunal for the purpose of deciding which prizes came within the Act so that their proceeds were payable into the Naval Prize Fund for distribution among members of the naval and marine forces. The decisions of this Tribunal are a matter of Municipal Law. As an illustration of these may be mentioned *The Abonema* [1919] P. 41. See also Garner, *Prize Law*, Nos. 28-31.

<sup>8</sup> See above, § 196.

time prize law has been made applicable to captures by, or of, aircraft.

§ 198. As merchantmen owned by subjects of neutral States but sailing under an enemy flag are vested with enemy character,<sup>1</sup> they may be captured and condemned. This bears hardly upon vessels belonging to subjects of non-littoral States which have no maritime flag; they are forced to navigate under the flag of another State,<sup>2</sup> and are, therefore, in case of war exposed to capture.

Vessels belonging to Subjects of Neutral States, but sailing under Enemy Flag.

§ 199. Moreover, a vessel flying a neutral flag may be captured and condemned if, for the reasons mentioned above in §§ 89, 91, she possesses enemy character.

Vessels sailing under Neutral Flag, but possessing Enemy Character.

§ 200. The position of goods belonging to enemy subjects when shipped, but sold *in transitu* to subjects of neutral States, has been considered above in § 92.

Goods sold to Neutrals *in transitu*.

#### IV

#### VIOLENCE AGAINST ENEMY PERSONS

See the literature quoted above at the commencement of § 107. See also Fauchille, §§ 1273-1273 (5), 1395 (44)-1395 (46)—Schramm, § 16—Rolin, §§ 596-598, 765-782, and Hyde, ii. §§ 773-775—Genet, §§ 148-159.

§ 201. As regards killing and wounding combatants in sea warfare, and the means used for the purpose, customary rules of International Law are in existence, according to which only those combatants may be killed or wounded who are able and willing to fight, or who resist capture. Men disabled by sickness or wounds, or such men as lay down arms and surrender, or do not resist capture, must be given quarter, except in a case of reprisals.<sup>3</sup> Poison, and such arms, projectiles, and materials as cause unnecessary injury, are prohibited, as are also killing and wounding in a treacherous way.<sup>4</sup> The Declaration of St. Petersburg,<sup>5</sup> and the Hague Declaration prohibiting the use of expanding

Violence against Combatants.

<sup>1</sup> See above, § 89.

<sup>2</sup> See above, § 186 (n.), as to the Barcelona Declaration of 1921, and vol. i. § 261.

<sup>3</sup> See above, § 109, and the case of the *Baralong* in § 211 (n.), below.

<sup>4</sup> See the corresponding rules for warfare on land, which are discussed above in §§ 108-110. See also U.S. Naval War Code, Article 3.

<sup>5</sup> See above, § 111.

(dum-dum)<sup>1</sup> bullets, apply to sea warfare as well as to land warfare, as also do the Hague Declarations concerning projectiles and explosives launched from balloons, and projectiles diffusing asphyxiating or deleterious gases.<sup>2</sup>

All combatants, and also all officers and members of the crews of captured merchantmen, could formerly<sup>3</sup> be made prisoners of war. Under Hague Convention XI,<sup>4</sup> such members of the crew of a captured enemy merchantman *as are neutral subjects*, and (provided they give a formal written promise not to serve on an enemy ship during the war) also the captain and officers *when neutral subjects*, must not be made prisoners of war<sup>5</sup> (Article 5); and the captain, officers, and crew of an enemy merchantman, *when enemy subjects*, must not be made prisoners of war, provided that they give a formal written promise not to engage in any service connected with the operations of the war (Article 6). During the World War this Convention was not binding, because not all the belligerents were parties to it, and enemy subjects who were members of the crews of merchantmen were made prisoners of war. In any case, as soon as such prisoners are landed, they fall under the provisions of the Geneva Convention of 1929.<sup>6</sup> As long as they are on board, the old customary rule of International Law, that prisoners must be treated humanely,<sup>7</sup> and not like convicts, must be complied with. Moreover, the Hague Convention for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare enacts some particular rules concerning the shipwrecked, the wounded, and the sick who, through falling into the hands of the enemy, become prisoners of war.<sup>8</sup>

Violence  
against  
Non-Com-  
batant  
Members  
of Naval  
Forces.

§ 202. Just as land forces consist of combatants and non-

<sup>1</sup> See above, § 112.

<sup>2</sup> See above, §§ 113, 114.

<sup>3</sup> This was almost generally recognised, but was refused recognition by Count Bismarck during the Franco-German War (see below, § 249 (n.)), and by some German writers, as, for instance, Lueder in *Holtzendorff*, iv. p. 479, n. 6.

<sup>4</sup> See above, § 85.

<sup>5</sup> As to the release of neutral

American members of crews of British ships captured by Germany see the case of the *Yarrowdale* in Hyde, ii. § 773 (n.).

<sup>6</sup> See above, § 127, and below, § 209b.

<sup>7</sup> See Holland, *Prize Law*, § 249, and U.S. Naval War Code, Articles 10, 11.

<sup>8</sup> See below, § 205.

combatants, so do the naval forces of belligerents. Non-combatants, as for instance stokers, surgeons, chaplains, members of the hospital staff, and the like, who do not take part in the fighting, may not be attacked directly and killed or wounded.<sup>1</sup> But they are exposed to all injuries indirectly resulting from attacks on, or by, their vessels; and they may certainly be made prisoners of war, unless they are members of the religious, medical, and hospital staff, who are inviolable according to Article 10 of Hague Convention X.<sup>2</sup>

§ 203. Likewise, enemy individuals who are not members of the naval forces at all, but are found on board an attacked or seized enemy vessel, if, and so far as, they do not take part in the fighting, may not directly be attacked and killed or wounded, although they are exposed to all injury indirectly resulting from an attack on, or by, their vessel. If they are mere private individuals, they may as an exception only, and under the same circumstances as private individuals on occupied territory, be made prisoners of war.<sup>3</sup> But they are nevertheless, for the time they are on board the captured vessel, under the discipline of the captor. All restrictive measures against them which are necessary are therefore lawful, as also are punishments in case they do not comply with lawful orders of the commanding officer. If they are enemy officials in important positions,<sup>4</sup> they may be made prisoners of war.

Violence  
against  
Enemy  
Indi-  
viduals  
not  
belonging  
to the  
Naval  
Forces.

## V

### TREATMENT OF WOUNDED AND SHIPWRECKED

Perels, § 37—Pillet, pp. 188-191—Westlake, ii. pp. 185-189—Moore, vii. § 1178—Hershey, Nos. 408-422—Bernsten, § 12—Fauchille, §§ 1395 (29)-1395 (43)—Pradier-Fodéré, viii. No. 3209—Suarez, §§ 412, 412b—Rolin, §§ 791-799—Hyde, ii. §§ 776-782—Verzijl, §§ 384-385—U.S. Naval War Code, Articles 21-29—Ferguson, *The Red Cross Alliance at Sea* (1871)—Houette, *De l'extension des principes de la convention de Genève aux vic-*

<sup>1</sup> See U.S. Naval War Code, U.S. Naval War Code, Article 11, Article 3. and above, § 116.

<sup>2</sup> See below, § 209.

<sup>3</sup> See Schramm, § 16; see also <sup>4</sup> See above, § 117.



*times des guerres maritimes* (1892)—Cauwès, *L'extension des principes de la convention de Genève aux guerres maritimes* (1899)—Holls, *The Peace Conference at The Hague* (1900), pp. 120-134—Boidin, pp. 248-262—Dupuis, *Guerre*, Nos. 82-105—Meurer, ii. §§ 74-87—Higgins, pp. 382-394—Lémonon, pp. 526-554—Nippold, ii. § 33—Scott, *Conferences*, pp. 599-614—Takahashi, pp. 375-385—Wehberg, § 10—Garner, i. §§ 319-327—Genet, §§ 160-165, 214-218—Keith's Wheaton, pp. 822-830—Fauchille in *R.G.*, vi. (1899) pp. 291-302—Bajer in *R.G.*, viii. (1901) pp. 225-230—Renault in *A.J.*, ii. (1908) pp. 295-306—Higgins, *War and the Private Citizen* (1912), pp. 73-87, in the *Law Quarterly Review*, xxvi. (1910) pp. 408-414, and in *B.Y.*, 1933, pp. 141-143—Schüle in *25 Jahre Kaiser Wilhelm-Gesellschaft*, iii. (1937) pp. 374-397—Sandiford, *Diritto marittimo di guerra* (1938), pp. 185-197. See also the literature quoted above at the commencement of § 118.

Adapta-  
tion of  
Geneva  
Conven-  
tion to Sea  
Warfare.

§ 204. Soon after the ratification of the Geneva Convention, the necessity of adapting its principles to naval warfare was generally recognised, and among the non-ratified additional articles of 1868 were nine which aimed at this.<sup>1</sup> But it was not until the Hague Conference in 1899 that this was accomplished by a Convention<sup>2</sup> which comprised fourteen articles. This Convention was replaced at the Second Hague Conference by Convention X. for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare, which comprises twenty-eight articles. It was signed, although with some reservations, by all the Powers represented at the conference, except Nicaragua, which acceded later; and it has been ratified, with or without reservations, by most of the signatory Powers.<sup>3</sup> It provides rules concerning the wounded, sick, shipwrecked, and dead; hospital ships; sick-bays on men-of-war; the distinctive colour and emblem of hospital ships; neutral vessels taking on board belligerent wounded, sick, or shipwrecked; the religious, medical, and hospital staff of captured ships; the carrying out of the Convention, and the prevention of abuses and infractions.

The  
Wounded,  
Sick, and  
Ship-  
wrecked.

§ 205. Soldiers,<sup>4</sup> sailors, and other persons officially

<sup>1</sup> See above, § 118, and vol. i. § 560.

<sup>2</sup> Martens, *N.R.G.*, 2nd ser., xxvi. p. 979.

<sup>3</sup> In January 1937 Italy adhered to this Convention.

<sup>4</sup> The opinion, stated in press reports of the Leipzig criminal trials in May-July 1921 to have been expressed by the German Public

Prosecutor, that hospital ships lost their immunities by carrying soldiers who had become casualties in land warfare, is erroneous—see Higgins in *B.Y.*, 1921-1922, pp. 177-178. The decision of the *Reichsgericht* in this case (*The Dover Castle*, *Annual Digest*, 1923-1924, Case No. 231) does not touch upon this aspect of the question.

attached to fleets or armies, whatever their nationality, who are taken on board when sick or wounded, must be respected and tended by the captors (Article 11). All enemy shipwrecked, sick, or wounded persons who fall into the power of a belligerent are prisoners of war. It is left to the captor to determine whether they are to be kept on board, or sent to a port of his own, or a neutral port, or even a hostile port. If sent to a hostile port, they may not again serve in the war (Article 14). If landed at a neutral port with the consent of the local authorities, they must be guarded by the neutral State so as to prevent them from again taking part in the war<sup>1</sup> (Article 15). After each engagement, both belligerents must, so far as military interests permit, take measures to search for the shipwrecked, wounded, and sick, and protect them against pillage and maltreatment (Article 16). They must send to the enemy authorities a list of names of enemy sick and wounded picked up by them, and information regarding internments, transfers, admissions to hospital, and deaths amongst the sick and wounded in their hands. They must also forward all objects of personal use, valuables, letters, etc., that are found in captured ships, for transmission to the persons concerned (Article 17).

§ 205a. After each engagement both belligerents must, so far as military interests permit, take measures to protect the dead against pillage and maltreatment, and they must see that their burial, whether on land or at sea, or cremation, is preceded by a careful examination in order to determine that life is really extinct (Article 16). They must send to the enemy authorities the military identification marks or tokens found on the dead; they must also forward all the objects of personal use, valuables, letters, etc., which have been left by the wounded and sick who die in hospital, for transmission to the persons concerned (Article 17).

§ 206. Three different kinds of hospital ships must be distinguished, namely: military hospital ships; hospital ships equipped by private individuals or relief societies of

Treat-  
ment of  
the Dead.

Hospital  
Ships.

<sup>1</sup> See below, § 348a.

the belligerents; and hospital ships equipped by private neutral individuals and neutral relief societies.

(1) Military hospital ships (Article 1) are ships constructed or assigned by States specially and solely to assist the wounded, sick, and shipwrecked. Their names must be communicated to the belligerents at the commencement of, or during hostilities, and in any case before they are employed. They must be respected by the belligerents, they may not be captured while hostilities last, and they are not on the same footing as men-of-war during their stay in a neutral port.

(2) Hospital ships equipped wholly, or in part, at the cost of private individuals, or officially recognised relief societies of the *belligerents*, must also be respected (Article 2), and are exempt from capture, provided their home State has given them an official commission, and a special certificate, and has notified their names to the other belligerent at the commencement of, or during, hostilities, and in any case before they are employed.

(3) Hospital ships, equipped wholly, or in part, at the cost of private individuals, or officially recognised relief societies of *neutral* States (Article 3), must likewise be respected, and are exempt from capture, provided that they are placed under the control of one of the belligerents, with the previous consent of their own Government and with the authorisation of the belligerent himself, and that their names have been similarly notified.

According to Article 4, all hospital ships must afford relief and assistance to the wounded, sick, and shipwrecked of both belligerents without distinction of nationality. The respective Governments are prohibited from using them for any military purpose. Their commanders must not in any way hamper the movements of the combatants, and during and after an engagement they act at their own risk and peril. Both belligerents have a right to control and visit all hospital ships, to refuse their assistance, to order them off, to make them take a certain course, to put a commissioner on board, and to detain them temporarily, if important circumstances require this.

The protection to which hospital ships are entitled ceases if they are used to commit acts harmful to the enemy (Article 8). But it is not lost merely because the staff are armed for the purpose of maintaining order and defending the wounded and sick, or because wireless telegraphic apparatus is on board. However, any man-of-war of either belligerent may, according to Article 12 (against which Great Britain made an interpretative reservation), demand the surrender of wounded, sick, or shipwrecked who are on board hospital ships of any kind.

It is to be regretted that, in practice, cases of the abuse of hospital ships for military purposes have occurred. Thus, in 1905, during the Russo-Japanese War, the *Orel*<sup>1</sup> (also called the *Aryel*), a Russian hospital ship, was captured and condemned by the Japanese Prize Courts for having performed, while serving as a hospital ship, certain services to the Russian fleet which amounted to use for military purposes. Again, in 1915, during the World War, the *Ophelia*,<sup>2</sup> a German hospital ship, was captured and condemned by the British Prize Court, because while adapted as a hospital ship, she was also fitted up as a signalling ship for military purposes.

Worse than the misuse of hospital ships for military purposes was the deliberate policy proclaimed by Germany<sup>3</sup> during the World War of sinking at sight without visit or search all hospital ships found in certain waters. In January 1917, after charging Great Britain and France with using hospital ships for the transport of troops and munitions and otherwise violating Hague Convention X. (charges which

<sup>1</sup> See Takahashi, pp. 620-625; Hurst and Bray, ii. p. 354; Higgins, p. 74, and in the *Law Quarterly Review*, xxvi. (1910) p. 408. See also Schüle in *25 Jahre Kaiser Wilhelm-Gesellschaft*, iii. (1937) pp. 387-397.

<sup>2</sup> [1916] 2 A.C. 206; 2 B. and C.P.C. 150. The German Government, by a declaration of November 30, 1915, protested against the *Ophelia* decision; it seems that the Anglo-American and the Continental writers hold different views on the conditions of the conversion of

merchantmen into hospital ships (and *vice versa*) and the extent to which signalling apparatus on hospital ships is permitted; see Renault in *Deuxième conférence, Actes*, iii. pp. 301, 533 *et seq.*, and Rocholl in *Strupp, Wört.*, ii. 176. See also the *Oceania* in Fauchille, *Jur. ital.*, 468.

<sup>3</sup> See Des Gouttes in *R.G.*, xxiv. (1917) pp. 469-486; Gallois, *L'inviolabilité des navires-hôpitaux et l'expérience de la guerre, 1914-1918* (1931).

were promptly repudiated), the German Government declared that they would 'no longer suffer any enemy hospital ship in the English Channel or parts of the North Sea.'<sup>1</sup> In March of the same year, after making further charges, they declared that enemy hospital ships met in a prescribed area of the Mediterranean would be 'regarded by the German naval forces as belligerent' and would be 'attacked forthwith.'<sup>2</sup> Even before these pronouncements hospital ships had been attacked by German submarines; thereafter they were freely sunk without warning, visit or search, and sometimes with great loss of life. Among the many victims of this policy were the *Asturias*, the *Gloucester Castle*, the *Donegal*, the *Lanfranc*, the *Dover Castle*, the *Rewa*, the *Glenart Castle*, and the *Llandovery Castle*.<sup>3</sup>

Hospital  
Ships in  
Neutral  
Ports.

§ 206a. For the purpose of defining the status of hospital ships when entering neutral ports, an international conference met at The Hague in 1904.<sup>4</sup> A convention (to which Great Britain was not a party) was signed on December 21, 1904, and provided that hospital ships complying with the Hague Convention should be exempt from State dues and taxes, but should nevertheless be subject to search and other formalities demanded by the laws in force in the port concerned.

Sick-  
Bays.

§ 206b. According to Article 7 of Hague Convention X., in case of a fight on board a man-of-war, the sick-bays must, as far as possible, be respected and spared.

Distinctive  
Colour  
and Em-  
blem of  
Hospital  
Ships.

§ 207. All military hospital ships must be painted white outside, with a horizontal band of green about one metre and a half in breadth. Other hospital ships must also be painted white outside, but with a horizontal band of red. The boats and small craft of hospital ships used for hospital

<sup>1</sup> Parl. Papers, Misc. No. 16 (1917), Cmd. 8692, p. 4. It appears that on only one occasion did the Germans exercise the right to stop and visit a hospital ship conferred by Article 4 of Hague Convention X., and then found nothing to support any charge. Had there been any truth in the allegations made by them against the Allied Governments, they could have proved them beyond question

by availing themselves of this article.

<sup>2</sup> *Ibid.*, p. 6.

<sup>3</sup> Details in Garner, i. §§ 320-326, who mentions the various unsuccessful attempts to stop the German practice. See also *Annual Digest*, 1923-1924, Cases Nos. 231 and 235.

<sup>4</sup> See above, i. § 592; Higgins, pp. 392-394; and Pohl in *Z.V.*, xi (1918-1920) pp. 306-315.

work must likewise be painted white. Besides being painted a distinguishing colour, all hospital ships (Article 5) must hoist, together with their national flag, the white flag with a red cross stipulated by the Geneva Convention.<sup>1</sup> If they belong to a neutral State, they must also fly at the mainmast the national flag of the belligerent under whose control they are placed. The distinguishing marks of hospital ships may at no time be used for any other purpose. All hospital ships which wish to ensure by night the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain.

§ 208. A distinction must be made between neutral men-of-war and private vessels assisting the sick, wounded, and shipwrecked.

Neutral  
Vessels  
assisting  
the  
Wounded,  
Sick, or  
Ship-  
wrecked.

(1) If men-of-war take on board wounded, sick, or shipwrecked persons, precaution must be taken, so far as possible, that they do not again take part in the operations of war (Article 13). They must not, however, be handed over to the adversary, but must be detained till the end of the war.<sup>2</sup>

(2) Neutral merchantmen,<sup>3</sup> yachts, or boats which have of their own accord rescued sick, wounded, or shipwrecked men, or who have taken such men on board at the appeal of the belligerent, must, according to Article 9, enjoy special protection and certain immunities. In no case may they be captured merely because they have such persons on board. But, subject to any undertaking that may have been given to them, they remain liable to capture for any violation of neutrality they may have committed. Moreover, according to Article 12,<sup>4</sup> any man-of-war of either belligerent may demand from them the surrender of the wounded, sick, or shipwrecked on board.

§ 209. Convention X. provides that the religious, medical, and hospital staff of any captured vessel are inviolable, and

The  
Religious,  
Medical,  
and  
Hospital  
Staff.

<sup>1</sup> There is no objection to the use by non-Christian States, who object to the cross on religious grounds, of another emblem. Thus Turkey reserved the right to use a red crescent, and Persia to use a red

sun. See above, § 123.

<sup>2</sup> See below, § 348.

<sup>3</sup> See below, § 348a.

<sup>4</sup> Against which Great Britain made an interpretative reservation.

may not be made prisoners of war, but must continue to discharge their duties while necessary. If they do this, the belligerent into whose hands they have fallen must give them the same allowances and the same pay as are granted to persons holding the same rank in his own navy. They may leave the ship, when the commander-in-chief considers it possible, and on leaving they are allowed to take with them all surgical articles and instruments which are their private property (Article 10).

Applica-  
tion of  
Conven-  
tion X.,  
and Pre-  
vention of  
Abuses.

§ 209a. The provisions of Convention X. are only binding so long as the war is a war between contracting Powers only (Article 18). In the case of operations of war between land and sea forces of belligerents, its provisions only apply to forces on board ship (Article 22). The contracting Powers undertook, in case their criminal laws were inadequate, to enact, or submit to their legislatures, measures necessary for checking individual acts of pillage or maltreatment of the wounded and sick in the fleet, and for punishing improper use of the distinguishing marks of hospital ships (Article 21).<sup>1</sup>

§ 209b. According to Articles 1 and 8 of the Convention of 1929 relative to the Treatment of Prisoners of War, the provisions of that Convention apply, with suitable modifications, to persons captured in the course of maritime warfare.<sup>2</sup>

## VI

### ESPIONAGE, TREASON, RUSES

See, besides the literature quoted above at the commencement of §§ 159 and 163, Pradier-Fodéré, viii. No. 3157—Fauchille, §§ 1317-1317 (2), 1388 (5)—Rolin, §§ 783-785—Hyde, ii. § 744—Campbell, *The Mystery Ships* (1928)—Bentwich in the *Journal of Comparative Legislation*, New Ser., x. (1910) pp. 243-249—Genet, §§ 141-148—Smith in *Hague Recueil*, 63 (1938) (i.), pp. 668-671—Grabau, *Der Gebrauch fremder Nationalflaggen im Seekrieg* (1936)—Bruneau, *La ruse dans la guerre sur mer* (1938).

<sup>1</sup> In 1937 the International Committee of the Red Cross drafted a project for the revision of the Convention. The project provided that in addition to members of the armed forces of the belligerents the Convention should protect shipwrecked, wounded, and sick persons of ships

which have become victims of an event connected with the war. See *Revue internationale de la Croix-Rouge*, 1937, pp. 901 et seq. See also Mosler in *Z.ö.V.*, viii. (1938) pp. 282-291.

<sup>2</sup> See above, §§ 126a and 127.

§ 210. Espionage<sup>1</sup> and war treason do not play so large a part in sea warfare as in land warfare<sup>2</sup>; but they may be employed. Since the Hague Regulations deal only with land warfare, there is no legal necessity for trying a spy in sea warfare by court-martial according to Article 30, although this is advisable.

§ 211. Ruses are customarily allowed in sea warfare within the same limits as in land warfare, perfidy being excluded. As regards the use of a false flag, it is by most writers considered perfectly lawful for a man-of-war to use a neutral or enemy flag (1) when chasing an enemy vessel, (2) when trying to escape, and (3) for the purpose of drawing an enemy vessel into action.<sup>3</sup> On the other hand, it is universally agreed that, immediately before an attack, a vessel must fly her national flag.<sup>4</sup>

<sup>1</sup> As regards the case of the *Haimun* see below, § 356 (4).

<sup>2</sup> See above, §§ 159-162.

<sup>3</sup> The use of a false flag on the part of a belligerent man-of-war is analogous to the use of the enemy flag and the like in land warfare; see above, § 164. British practice—see Holland, *Prize Law*, § 200—permits the use of false colours. U.S. Naval War Code, Article 7, forbade it altogether, but as late as 1898, during the war with Spain, two American men-of-war used the Spanish flag (see Perels, p. 183). During the war between Turkey and Russia, in 1877, Russian men-of-war in the Black Sea used the Italian flag (see Martens, ii. § 133, p. 566). The use of a neutral or enemy flag is considered to be lawful, among others, by Ortolan, ii. p. 29; Fiore, iii. No. 1340; Perels, § 35, p. 183; Pillet, p. 116; Calvo, iv. 2106; Hall, § 187. See also Pillet in *R.G.*, v. (1898) pp. 444-451. But see the arguments against the use of a false flag in Pradier-Fodéré, vi. No. 2760, Wehberg, pp. 261-262, and *Harvard Research* (1939), p. 359. See also *ibid.*, pp. 353-359, for a survey of the practice in the matter. The right of a belligerent merchantman to use a false flag was discussed by the British and United States Governments during the World War. See Parl. Papers, Misc. No. 6 (1915),

Cmd. 7816.

<sup>4</sup> Halleck (vol. i. p. 624) relates the following two instances: In 1783 the *Sybilie*, a French frigate of thirty-eight guns, enticed the British man-of-war *Hussar* by displaying the British flag, and intimating herself to be a distressed prize of a British captor. When the *Hussar* approached to succour her, she at once attacked without showing the French flag, but was overpowered and captured. The commander of the *Hussar* then publicly broke the sword of the commander of the *Sybilie*, whom he justly accused of perfidy, although the French commander was acquitted when subsequently brought to trial by the French Government. In 1813 two merchants of New York carried out a plan for destroying the British man-of-war *Ramillies* in the following way. A schooner, with some casks of flour on deck, was laden with several casks of gunpowder having trains leading from a species of gunlock, which, by the action of clockwork, was to go off at a given time after it had been set, and came up to the *Ramillies* in order to be captured. The *Ramillies* sent a boat with thirteen men and a lieutenant to cut her off. Subsequently the crew of the schooner abandoned her, and she blew up with the lieutenant and his men on board.



Vattel<sup>1</sup> relates the following case of perfidy: In 1755, during war between Great Britain and France, a British man-of-war appeared off Calais, made signals of distress, and then seized a French sloop and some sailors who came to bring her help. Vattel was himself not certain whether this case was fact or fiction. But there is no doubt that, if true, it is an example of perfidy, which is not allowed.

On the other hand, the following is a perfectly legitimate ruse which is reported to have occurred during the World War: At the end of October 1914, the German cruiser *Emden*, hiding her identity by rigging up a dummy fourth funnel and flying the Japanese flag, passed the guardship of the harbour of Penang in the Malay States, made no reply to its signals, came down at full speed on the Russian cruiser *Zhemshug*, and then, after lowering the Japanese flag<sup>2</sup> and hoisting the German flag, opened fire and torpedoed her.<sup>3</sup>

## VII

### REQUISITIONS, CONTRIBUTIONS, BOMBARDMENT

Hall, § 140\*—Lawrence, § 204—Westlake, ii. pp. 182-184—Moore, vii. §§ 1166-1174—Hershey, No. 427—Taylor, § 499—Fauchille, §§ 1320-1320 (4), 1395 (10)-1395 (13)—Despagnet, Nos. 618-618 bis—Fiore, *Code*, Nos. 1655-1664—Pradier-Fodéré, viii. Nos. 3153-3154—Nys, iii. pp. 392-396—Pillet, p. 117—Rolin, §§ 659-669—Hyde, §§ 710-712—Perels, § 35, p. 181—Holland, *Studies*, pp. 96-111—Dupuis, Nos. 67-73, and *Guerre*, Nos. 42-47—Barclay, *Problems*, p. 51—Higgins, pp. 352-357—Keith's Wheaton, pp. 889-893—Lémonon, pp. 503-525—Bernsten, § 7, ii.—Boidin, pp. 201-215—Nippold, ii. § 28—Scott, *Conferences*, pp. 587-598, and in *A.J.*, ii.

<sup>1</sup> iii. § 178.

<sup>2</sup> It is understood that this account has been denied on the German side, but it is substantially confirmed by Sir Julian Corbett's account in *Naval Operations (History of the Great War based on Official Documents)*, i. (1920) p. 350.

<sup>3</sup> Fleischmann in Liszt, § 63, ii. (n.) accuses the British cruiser *Baralong* of misuse of a neutral flag, and her crew of shooting the crew of a German submarine after capture; see literature cited by him, and also Fauchille, § 1395 (40); Perrinjaquet in *E.G.*, xxiv. (1917) pp. 137-142;

Rocholl in *Strupp, Wört.*, i. pp. 113-114; Spaight, *Air*, p. 45; Buchan, *History of the Great War*, ii. pp. 384-385, and J. A. Hall, *Law of Naval Warfare* (1921), p. 117 (last two cited by Spaight, *op. cit.*). The British Government made an offer to the German Government to submit the *Baralong* accusation together with three British accusations of cruelty against Germany to an inquiry by naval officers of a neutral State, but the offer was not accepted, which Rocholl (*supra*) regards as a mistake: Parl. Papers, Misc. Nos. 1 and 7 (1916), Cmd. 8144, 8176.

(1908) pp. 285-294—Wehberg, pp. 93-97—Garner, i. §§ 273-278—Spaight, *Air Power and the Cities* (1930), pp. 18-106.

§ 212. No case has, it would appear, occurred in Europe <sup>1</sup> Requisitions and Contributions upon Coast Towns. of requisitions or contributions imposed by naval forces upon enemy coast towns. The question of their legality was raised long ago by an article on naval warfare of the future, published in 1882 by the French Admiral Aube in the *Revue des Deux Mondes*.<sup>2</sup> But the position remained uncertain until the Second Hague Conference met. That conference produced a convention (IX.), two articles of which—3 and 4—deal with requisitions and contributions.

*Requisitions*.—According to Article 3, undefended ports, towns, villages, dwellings, or other buildings may be bombarded by a naval force, if the local authorities, on a formal summons being made to them, decline to comply with requisitions for provisions or supplies *necessary for the immediate use* of the naval force concerned. These requisitions must be proportional to the resources of the place; they can only be demanded by the commander of the naval force concerned; they must be paid for in cash, and, if this is not possible for want of sufficient ready money, their receipt must be acknowledged.

*Contributions*.—Convention IX. does not directly forbid a demand for them, but Article 4 expressly forbids bombardment of undefended places by a naval force on account of non-payment of money contributions; in practice, therefore, the demand for contributions will not occur in naval warfare.

§ 213. There is no doubt whatever that enemy coast towns which are defended may be bombarded by naval forces, acting either independently or in co-operation with a besieging army.<sup>3</sup> But before the Second Hague Conference of 1907 the question was not settled whether or not *open and undefended* coast places might be bombarded by naval forces. The Institute of International Law in 1895, at its meeting at Cambridge, appointed a committee to

<sup>1</sup> Holland, *Studies*, p. 101, mentions a case which occurred in South America in 1871.

<sup>2</sup> Vol. i. p. 331. See also Hall, § 140\*.

<sup>3</sup> For an account of various cases of naval bombardment see Spaight, *Air Power and the Cities* (1930), pp. 32-106.

investigate the matter.<sup>1</sup> On the basis of the report of this committee the Institute adopted for consideration by the States a body of rules declaring that the law of bombardment was the same in both land warfare and sea warfare. This view, however, did not prove acceptable to the Powers.

The First Hague Conference did not settle the matter, but suggested that it should be considered at a subsequent conference. The Second Hague Conference, by Convention IX., provided detailed rules on the matter. Their distinguishing feature was that they combined the test of defence with a new test—that of the military objective. They provided :

(1) The bombardment of undefended ports, towns, villages, dwellings, or other buildings by naval forces is under all circumstances and conditions prohibited (Article 1). To define the term 'undefended,' Article 1 expressly enacted that 'a place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbour,' but Great Britain, France, Germany, and Japan entered a reservation against this, since they correctly considered such a place to be 'defended.'

(2) Although undefended places themselves are exempt, nevertheless military works, military or naval establishments, depots of arms or war material, workshops or plant which could be utilised for the needs of the hostile fleet or army, and men-of-war in the harbour of undefended places, may be bombarded ; and no responsibility is incurred for any unavoidable damage caused thereby to the undefended place or its inhabitants. As a rule, however, the commander must, before resorting to bombardment of these works, ships, and the like, give warning to the local authorities so that they may themselves destroy them. Only if, for military reasons, immediate action is necessary, and no delay can be allowed to the enemy, may bombardment be resorted to without previous warning, the commander being compelled to take all due measures in order that the undefended place itself may suffer as little harm as possible (Article 2).

<sup>1</sup> See *Annuaire*, xv. (1896) pp. 145-151, 309-315.

(3) In case undefended places do not comply with legitimate requisitions,<sup>1</sup> they may be bombarded.

(4) In case of bombardments, all necessary steps must be taken to spare buildings devoted to public worship, art, science, or charitable purposes; historical monuments; hospitals, and places where the sick or wounded are collected, provided they are not at the time used for military purposes. To enable the attacking force to carry out this article, the privileged buildings, monuments, and places must be indicated by visible signs, consisting of large stiff rectangular panels, divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white (Article 5). Unless military exigencies render it impossible, the commander of an attacking naval force must, before commencing the bombardment, do all in his power to warn the authorities (Article 6).

(5) The giving over to pillage of a town or place, even when taken by assault, is forbidden (Article 7).<sup>2</sup>

During the World War the Hague Convention was not, or may not have been, in strict law binding, since not all the belligerents were parties to it. However this may be, the German bombardments of Scarborough, Hartlepool, Whitby, Whitehaven, and other English coast towns ignored the spirit<sup>3</sup> of the Convention, for these raids had no military

<sup>1</sup> See above, § 212.

<sup>2</sup> The first case in which these rules were tested in practice occurred during the Turco-Italian War. On February 25, 1912, Admiral Faravelli, the commander of an Italian squadron, surprised, at dawn, the Turkish gunboat *Awni-Illa*, and a torpedo-boat, in the port of Beirut, and called upon them to surrender, giving them until nine o'clock to do so. The demand was communicated to the governor and the consular authorities. At nine o'clock the Turkish vessels were again, by signal, summoned to surrender, and as no reply was received, they were fired at and destroyed, though at first they vigorously answered the fire of the Italians. Shells missing the vessels and bursting on the quay killed and wounded a number of individuals and damaged several buildings. The

Turkish Government protested against this procedure as a violation of Convention IX., but, if the report of Admiral Faravelli was accurate, the protest was without justification.

<sup>3</sup> For approving comment on this see Spaight, *Air Power and the Cities* (1930), pp. 83, 84. The editor is not hopeful of the possibility, suggested by Spaight, *loc. cit.*, of the amendment of the Convention by the substitution of the test of the 'military objective' for that of 'defence.' It is true that in the modern conditions of war the latter shows a tendency to expansion (see, in another sphere, the controversies as to the meaning of Article 34 of the Declaration of London, § 395, note), but that elasticity is not absent from the test based on the conception of the military objective.

purpose whatever, unless it is a legitimate military purpose to attempt to frighten and terrorise the civil population of the enemy—a condition which neither the fundamental principles of the law of war (see below, § 214*ea*), nor considerations of humanity permit to accept.

## VIII

### INTERFERENCE WITH SUBMARINE TELEGRAPH CABLES

Moore, vii. § 1176—Hershey, No. 397—Westlake, ii. pp. 116-119—Liszt, § 63, iv—Fauchille, §§ 1187 (1), 1321, 1321 (1)—Hyde, i. § 211, ii. § 723—Pradier-Fodéré, vi. No. 2772—Nys, iii. pp. 314-327—Fiore, iii. No. 1387, and *Code*, Nos. 1672-1677—Rolin, §§ 759-763—Perels, § 35, p. 185—Perdrix, *Les câbles sousmarins et leur protection internationale* (1902)—Kraemer, *Die unterseeischen Telegraphenkabel in Kriegszeiten* (1903)—Scholz, *Krieg und Seekabel* (1904)—Jouhannaud, *Les câbles sousmarins* (1904)—Zuculin, *I cavi sottomarini e il telegrafo senza fili nel diritto di guerra* (1907)—Wehberg, pp. 134-138—Holland in *Clunet*, xxv. (1898) pp. 648-652, and *War*, No. 114—Goffin in the *Law Quarterly Review*, xv. (1899) pp. 145-154—Bar in the *Archiv für öffentliches Recht*, xv. (1900) pp. 414-421—Rey in *R.G.*, viii. (1901) pp. 681-762—Dupuis in *R.G.*, x. (1903) pp. 532-547—Nordon in the *Law Magazine and Review*, xxxii. (1907) pp. 166-184—Cybichowski in *Z.I.*, xvii. (1907) pp. 160-201—Garner, ii. § 560—Genet, §§ 209-213—Strupp, *Wört.*, i. pp. 608-610—Higgins in *B.Y.*, 1921-1922, pp. 27-36—Coudert in *Annuaire*, xxxiii. (1) (1927) pp. 170-184—Lémonon, *ibid.*, pp. 189-190. See also the literature quoted above, vol. i., at the commencement of § 286.

Uncertainty of Rules concerning Interference with Submarine Telegraph Cables.

§ 214. As the International Convention for the Protection of Submarine Telegraph Cables of 1884<sup>1</sup> expressly stipulates by Article 15 that freedom of action is reserved to belligerents, the question is not settled how far belligerents are entitled to interfere with submarine telegraph cables. The Second Hague Conference inserted in Article 54 of the Hague Regulations a provision that submarine cables connecting occupied enemy territory with a neutral territory should not be seized or destroyed, and that, if a case of absolute necessity compelled the occupants to seize or destroy such a cable, it must be restored after the conclusion of peace

<sup>1</sup> See above, vol. i. §§ 286, 287.

and compensation paid. But there are no rules for other possible cases of seizure and destruction.<sup>1</sup>

During the World War, the belligerents cut, and in many cases diverted and used, cables communicating with enemy territory, and at the Peace Conference at Paris questions arose as to the legality of these actions, and also as to whether cables belonging to an enemy company or an enemy State were subject to the right of capture of enemy property at sea.<sup>2</sup> By the Treaty of Peace with Germany, Germany renounced on behalf of herself and her subjects all rights in any of the cables there mentioned, though the value of those that were privately owned was to be credited to the Reparation account.<sup>3</sup> But neither this provision, nor the provisions of other treaties of peace, can be regarded as enunciating any rule of law on a subject quite unsettled.<sup>4</sup>

<sup>1</sup> The Institute of International Law adopted five rules at its meeting at Brussels in 1902 (see *Annuaire*, xix. (1902) p. 331); but they were superseded by Article 54 of the *Manuel des lois de la guerre maritime*, adopted by the Institute at its meeting at Oxford in 1913. (See *Annuaire*, xxvi. (1913) p. 657.)

<sup>2</sup> Latifi, *Effects of War on Property* (1909), p. 114, says that they

are not, and so does Scholz, *op. cit.*, but I have no doubt that they are.

<sup>3</sup> Article 244, and Annex vii. thereto.

<sup>4</sup> See Scholz, *Krieg und Seekabel* (1904). And see two awards of a British and American Claims Commission, on incidents occurring in the Spanish-American War, in *A.J.*, xviii. (1924) pp. 835-844; *Annual Digest*, 1923-1924, Case No. 225.

## CHAPTER IV<sub>A</sub>

### AIR WARFARE<sup>1</sup>

Fauchille, §§ 1440(4)-1440(50)—Despagnet, No. 721 *bis*—Mérignhac, iii<sup>e</sup>. pp. 299-345—Lawrence, § 204—Higgins in Hall, § 183a—Hyde, ii. § 663—Suarez, §§ 478-482—Cruchaga, §§ 1129-1141—Gemma, pp. 325-327—Rolin, §§ 888-920—Mérignhac-Lémonon, i. pp. 619-750—Fenwick, pp. 525-529—Kunz, pp. 190-202, 299-302—Meyer, *Die Luftschiffahrt in kriegsrechtlicher Beleuchtung* (1909)—Philit, *La guerre aérienne* (1910)—Stael Holstein, *La réglementation de la guerre des airs* (1911)—Bellenger, *La guerre aérienne et le droit international* (1912)—Spaight, *Aircraft in War* (1914)—Spaight, *Aircraft and Commerce in War* (1926) (cited as Spaight, *Commerce*)—Spaight, *Air Power and War Rights* (2nd ed., 1933) (cited as Spaight, *Air*)—Garner, i. §§ 291-312—British Air Force Manual (1921)—Moore, *Current Illusions*, pp. 182-188—Keith's Wheaton, pp. 901-912—Le Goffe, *Traité de droit aérien* (1934), pp. 466-518—Garner, *Developments*, pp. 164-184—Lebon, *La guerre aérienne* (1923)—Yvon, *La guerre aérienne* (1924)—Schleicher in Strupp, *Wört.*, i. pp. 548-551—*Légitimité de la guerre aérienne, opinions recueillies par A. H. Couannier* (1925), and the same, *Éléments créateurs du droit aériens* (1929), pp. 179 *et seq.*—General Report of the Commission of Jurists containing the Proposed Air Warfare Rules of 1923, in Cmd. 2201 of 1924, and *A.J.*, xxxii. (1938), Suppl., pp. 1-56—Hackwitz, *Die Neutralität im Luftkriegsrecht* (1927)—Royse, *Aerial Bombardment and the International Regulation of Warfare* (1928)—Spaight, *Air Power and the Cities* (1930)—*La protection des populations civiles contre les bombardements* (1930) (A collection of essays by Hammarskjöld, Macdonough, Royse, Scialoja, Sibert, Simons, van Eysinga, and Züblin)—Manchot, *Die Entwicklung der völkerrechtlichen Regelung der Luftfahrt und des Luftkrieges* (1930)—Volkman, *Internationales Luftrecht* (1930), pp. 107-213—Jones, *The War in the Air* (1928-1931)—Kroell, *Traité de droit international public aérien*, ii. (1936)—Sandiford, *Diritto aeronautico di guerra* (1937)—Nys, Fauchille, and Bar in *Annuaire*, xix. (1902) pp. 58-114, xxiv. (1911) pp. 23-133—Fauchille in *R.G.*, viii. (1901) pp. 414-485, xxiv. (1917) pp. 56-74—Ellis in *A.J.*, viii. (1914) pp. 256-277—Picciotto in the *Journal of Comparative Legislation*, New Ser., xv. (1915) pp. 150-155—Winfield in the *Law Magazine and Review*, xl. (1914-1915) pp. 257-271—Rolland in *R.G.*, xxxiii. (1916) pp. 497-604—Fauchille in *R.G.*, xxiv. (1917) pp. 56-74—Spaight

<sup>1</sup> For an exhaustive study of the practice during the World War, and a forecast of the development of the law, see Dr. Spaight's valuable work, *Air Power and War Rights* (2nd ed., 1933) (cited as Spaight, *Air*); and, for a shorter study of the relation of air warfare to national security, his

*Aircraft and Commerce in War* (1926) (cited as Spaight, *Commerce*). (Dr. Spaight was a member of the British Delegation to the Commission of Jurists, referred to in the literature cited above, as expert adviser on behalf of the Air Ministry.)

in *B.Y.*, 1923-1924, pp. 21-33, and 1925, pp. 1-7—Garner in *R.G.*, xxx. (1923) pp. 372-401, and in *A.J.*, viii. (1924) pp. 56-81—Latey in *Grotius Society*, vii. (1922) pp. 73-87, and in *Journal of Comparative Legislation*, 3rd ser., vii. (1925) pp. 96-100—Manisty in *Grotius Society*, vii. (1922) pp. 33-41—Rodgers in *A.J.*, xvii. (1923) pp. 629-640—Colby in *A.J.*, xix. (1925) pp. 702-715—Sloutzki in *R.I. (Geneva)*, 1924, pp. 48-60, 151-169—Spiropoulos in *Z.I.*, xxix. (1921) pp. 189-205—Colby in *Minnesota Law Review*, x. (1925-1926) pp. 207-234, 309-324—Williams in *A.J.*, xxiii. (1929) pp. 570-581—Sibert in *R.G.*, xxxvii. (1930) pp. 621-658—Quindry in *Journal of Air Law*, ii. (1931) pp. 474-509—Sandiford, *ibid.*, xxxix. (1932) pp. 739-775—Warren in *A.J.*, xxix. (1935) pp. 197-205—Riesch in *Archiv für Luftrecht*, ix. (1939) pp. 20-44. See also a number of articles in *Revue juridique internationale de la locomotion aérienne*, and the literature cited above, vol. i. § 197a.

§ 214a. When the First Hague Conference met in 1899, Rules before the World War. the destructive possibilities of aircraft were beginning to arouse speculation everywhere. Some small use of balloons had, indeed, been made in previous wars; but navigable air-vessels, capable of extensive use as engines of war, then for the first time seemed to be within the reach of practical science. In this atmosphere, the Conference adopted an easy but inconclusive solution of the difficulties by forbidding the launching of projectiles or explosives from balloons or air-vessels for a term of five years.<sup>1</sup> Between the First and the Second Hague Conferences there was marked progress in aerial invention, which led to a change of attitude on the part of many important States; and though the Conference of 1907 renewed the prohibition against launching explosives or projectiles from aircraft up to the close of the projected Third Hague Conference, many of the stronger military Powers refused to sign the declaration by which the prohibition was prolonged. However, to Article 25 of the Hague Regulations, which prohibits attack or bombardment of towns, habitations, or buildings which are not defended,<sup>2</sup> were added the words 'by any means whatever,' and these words were designed to cover bombardment by aircraft. The legal position of aircraft in war was again considered by the Institute of International Law, at its meeting at Madrid in 1911, and the principle was adopted<sup>3</sup> that aerial warfare must not comprise greater

<sup>1</sup> See above, § 114.

<sup>2</sup> See above, § 156.

<sup>3</sup> See *Annuaire*, xxiv. (1911) p. 346.



danger to the person and the property of the peaceful population than land or sea warfare. But the deliberations of the Institute could not, of course, create International Law; and the Hague Declaration and Article 25 of the Hague Regulations were almost <sup>1</sup> the only rules relating to aircraft in war existing at the outbreak of the World War. Of these, the Declaration was certainly not binding, for, among other belligerents, neither France nor Germany had signed it,<sup>2</sup> and even the binding force of Article 25 was controversial.<sup>3</sup> Assuming that Article 25 was binding, there was at any rate no rule to determine what constitutes a 'defended' place within its meaning. The World War revealed both the possibilities of air warfare and the apparent novelty of the problems with which International Law was confronted.

The  
Practice  
of the  
World  
War  
and the  
Hague  
Rules  
of Air  
Warfare.

§ 214b. During the World War aircraft was widely used as an auxiliary arm for both land and naval operations for the purposes of observation and direct attack upon troops and ships. As the war progressed, its use was extended to cover operations outside the actual theatre of war. And it was resorted to in this connection by belligerents on both sides not only with the object of attacking and destroying military objectives proper, but also as a measure directed against the civilian population. In all these spheres experience showed the need for an agreed regulation of this new weapon of warfare.

With the view to regulating the use of aircraft against the armed forces, the maritime commerce and military objectives of the enemy, and to protecting the civilian population from the dangers of indiscriminate bombardment, the States represented at the Washington Conference of 1922 on the Limitation of Armaments <sup>4</sup> decided on the appointment of a Commission of Jurists charged with the task of

<sup>1</sup> See, however, Article 29 of the Hague Regulations (above, § 160), which deals with the carrying of despatches by balloons, and Article 53 (above, § 137), which deals with the seizure by an occupying belligerent of 'les moyens affectés . . . dans les airs à la transmission des nouvelles, au transport des personnes

ou des choses.'

<sup>2</sup> See above, § 114.

<sup>3</sup> See Garner, i. § 297.

<sup>4</sup> The British Empire, the United States of America, France, Italy, and Japan. Holland was subsequently invited to participate in the work of the Commission.

proposing a code of Air Warfare Rules. In 1923 the Commission produced the proposed code of Rules.<sup>1</sup> Although these have not been ratified, they are of importance as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war and they will doubtless prove a convenient starting-point for any future steps in this direction. On occasions governments have announced that they would act in accordance with the provisions of the Hague Air Warfare Rules.<sup>2</sup>

§ 214c. The principal object of the Hague Air Warfare Rules was to propose a legal regulation of the special problems raised by air warfare. These include the question of external marks and belligerent qualification of aircraft (Articles 2-17, 19); the use of incendiary or explosive bullets (Article 18)<sup>3</sup>; disseminating propaganda by aircraft (Article 21)<sup>4</sup>; aerial bombardment (Articles 23-26)<sup>5</sup>; the right of the belligerent to warn neutral aircraft off a particular zone and to exclude them by force (Article 30); treatment of and operations against enemy non-military aircraft and neutral aircraft (Articles 32-35)<sup>6</sup>; treatment of crews of enemy military aircraft (Article 36); the duties of the belligerents towards neutral States, and of neutral States towards belligerents (Articles 39-48)<sup>7</sup>; and the law relating to visit, search, capture, and condemnation in connection with the exercise of the rights of blockade and contraband and the prevention of unneutral service (Articles 49-60).<sup>8</sup> The Rules do not pretend to be exhaustive. Article

Rules  
of Air  
Warfare  
in relation  
to Rules  
of War on  
Land and  
at Sea.

<sup>1</sup> Cmd. 2201 of 1924, and *A.J.*, xvii. (1923), Suppl., pp. 245-260, and xxxii. (1938), Suppl., pp. 1-56 (including the Commission's comment on the Rules). The Rules were intended to be supplementary to the Air Navigation Convention of 1919. See vol. i. § 197a-197c.

<sup>2</sup> As did, for instance, Japan in 1937 in the course of the hostilities against China. Reference may also be made to the proposed Rules for the Control of Radio (which includes radio-telegraphy, radio-telephony, and radio-goniometry) in Time of War, which were drawn up by the same Commission of Jurists as prepared

the Code of Air Warfare Rules. See the General Report of the Commission, Cmd. 2201 of 1924, and in *A.J.*, xvii. (1923), Suppl., pp. 242-245, and xxxii. (1938), Suppl., pp. 2-11, and see below, § 356. The General Report of the Commission contains a useful summary of the existing conventions relating to Radio; and see Rodgers in *A.J.*, xvii. (1923) pp. 636-638.

<sup>3</sup> See below, § 214d.

<sup>4</sup> See above, § 162a.

<sup>5</sup> See below, §§ 214e and 214g.

<sup>6</sup> See below, § 214f.

<sup>7</sup> See below, §§ 335a, 341a.

<sup>8</sup> See below, §§ 380b, 435a.

62 lays down that, apart from the Rules themselves and apart from questions which by treaty are subject to the rules of naval warfare,<sup>1</sup> 'aircraft personnel engaged in hostilities come under the laws of war and neutrality applicable to land troops.'

Although the Hague Rules have not been ratified, the latter provision indicates correctly that air warfare, while calling for rules of its own regulating in detail the specific situations to which it gives rise, is subject to the general principles of a customary or conventional<sup>2</sup> character which underlie alike the law of war on land and at sea. These include, for instance, in addition to humanitarian principles of unchallenged applicability, the fundamental prohibition of direct attack upon non-combatants or the principle that neutral territory must not be allowed to become a basis of operations and preparations against either belligerent. Whenever a departure from these principles is alleged to be necessary, its cogency must be proved by reference either to express agreement or to the peculiar conditions of aerial warfare.<sup>3</sup>

Instru-  
ments of  
Force in  
Aerial  
Warfare.

§ 214*d*. Thus it is probable that the special conditions of air warfare may necessitate a modification of the rules limiting or prohibiting the employment of certain kinds of weapons. In the later part of the World War belligerent aircraft on both sides resorted to the use, as against aircraft, of incendiary and explosive projectiles which, if employed in land warfare, would have been contrary to the Declaration of St. Petersburg of 1868<sup>4</sup> and, possibly, also to the Hague Declaration of 1899.<sup>5</sup> In so far as the resort to such weapons serves primarily the purpose of disabling enemy aircraft it will be difficult to insist on the full application of these prohibitions to air warfare. This is so notwithstanding the fact that the use of such projectiles against aircraft may

<sup>1</sup> On the application of admiralty and maritime doctrines to problems of air law see Knauth in *Air Law Review*, 6 (1935), pp. 226-237, 309-332.

<sup>2</sup> The Convention of July 27, 1929, concerning the Treatment of Prisoners of War provides expressly that it applies to all persons belonging to the armed forces of the enemy captured in

the course of operations of maritime or aerial war (Article 1 (2)): Hudson, *Legislation*, v. (1936) p. 26. And see above, § 122*a*, on medical aircraft.

<sup>3</sup> See on this question Spaight, *Air*, pp. 31-39. See also Kunz, pp. 193-196.

<sup>4</sup> See above, § 111.

<sup>5</sup> See above, § 112.

entail upon its occupants a degree of suffering whose infliction has been rightly stigmatised as inhuman.<sup>1</sup> The Air Warfare Rules of 1923 provided that 'the use of tracer,<sup>2</sup> incendiary, or explosive projectiles by or against aircraft is not prohibited' (Article 18) and that this provision applied equally to States which are and which are not parties to the Declaration of St. Petersburg. Similarly, the conditions of warfare may make it impracticable to apply literally the rules of land warfare which permit the killing and wounding of such combatants only as are able and willing to offer resistance.<sup>3</sup> In air combat it is not prohibited to attack the enemy in an apparently disabled machine, seeing that he is not in a position to surrender at discretion. Neither is it forbidden to fire on the enemy whose machine has crashed on enemy ground or who, after having crashed on his opponent's ground, commits a hostile act, for instance, by attempting to burn his machine,<sup>4</sup> or who descends by parachute for a purpose other than escape from a disabled machine.<sup>5</sup>

§ 214e. Perhaps the most crucial clauses in the code are those regulating bombardment, of which the principal are as follows :—

Aerial  
Bombard-  
ment.

ARTICLE 22.—'Aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, is prohibited.'

<sup>1</sup> See Spaight, *Air*, pp. 191-193. And see *ibid.*, pp. 161-194, for a detailed discussion of the whole question.

<sup>2</sup> Tracer bullets are provided with a charge of incandescent chemical material so as to enable the firer to follow the path of the bullet.

<sup>3</sup> See above, § 108.

<sup>4</sup> The burning of the machine, while being in the nature of a military duty on the part of the crashed airman, is a warlike act which a neutral State, if the crash has occurred on its territory, is bound to prevent by the means at its disposal without, however, being entitled to penalise it.

<sup>5</sup> See Spaight, *Air*, pp. 117-144.

The Italian War Regulations of 1938 provide that it is forbidden to fire on shipwrecked members of enemy forces or on airmen whose machine has come to grief (Article 35 (3)), but that persons descending in parachutes may be fired upon (Article 38). On killing apparently defenceless enemies descending in parachutes see Mandl in *R.G.D.A.*, 4 (1935), pp. 486-490. On parachutes as an instrument of espionage see Riesch, *ibid.*, 1 (1932), pp. 813-821. And see Article 20 of the Hague Air Warfare Rules which provides that after an aircraft has been disabled the occupants when attempting to escape by means of a parachute must not be attacked in the course of their descent.

ARTICLE 23.—‘Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.’

ARTICLE 24.—‘(1) Aerial bombardment is legitimate only when directed at a military objective—that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

‘(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes.

‘(3) The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

‘(4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings, or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

‘(5) A belligerent State is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article.’

It should be noted that these clauses discard the obsolete and unworkable test of liability to bombardment which rests on the distinction between ‘defended’ and ‘undefended’ places,<sup>1</sup> and are inspired mainly by the

<sup>1</sup> See above, § 214a, and Spaight, *Air*, p. 197. See also above, § 158.

doctrine that bombardment should be confined to military objectives.<sup>1</sup>

§ 214ea. In the Resolution adopted by the General Aerial Bombardment and Non-Combatants Commission of the Disarmament Conference in July 1932, and registering the agreed conclusions of the first phase of the Conference, it was laid down that 'air attack against the civilian population shall be absolutely prohibited.'<sup>2</sup> The fact that neither this Resolution nor the Hague Rules of 1923 have become part of International Law ought not to be interpreted as meaning that the matter is not governed by existing principles of law.<sup>3</sup> The immunity of non-combatants from direct attack is one of the fundamental rules of the International Law of war. It is a rule which applies with absolute cogency alike to warfare on land, at sea, and in the air. This is not a question of the application, by analogy, to air warfare of the rules obtaining in warfare

<sup>1</sup> See Spaight, *Air*, pp. 212-238, where the bombardment clauses are examined. Article 25 relates to the protection of 'buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals,' etc.; and Article 26 enables States to establish zones of protection round important historic monuments. See on this subject, in connection with a conference held in Monaco in February 1934, Clemens, *Le projet de Monaco. Le droit et la guerre. Villes sanitaires et villes de sécurité* (1937).

<sup>2</sup> League Doc. 1932. IX. 63, p. 268; *Documents*, 1932, p. 179. In August 1938 the Japanese Foreign Office stated, in connection with the bombing of an enemy civil aircraft, that since the beginning of the hostilities they had observed the Hague Rules of 1923. But see p. 418, n. 1. See also the protest of the United States to the Japanese Government, on September 22, 1937, in connection with the announcement made by the latter of its intention to resort to bombing in and around the city of Nanking, which stated that it held 'the view that any general bombing of an extensive area wherein there resides a large populace engaged in peaceful pursuits is unwarranted and

contrary to principles of law and of humanity.' *Documents*, 1937, p. 683. See also Hoiyer in *R.G.D.A.*, 6 (1937), pp. 521-541 and Chrétien in *R.G.*, xlv. (1939) pp. 281-302. The Italian War Regulations of 1938 (see above, p. 181) provide in Articles 40-42 that bombardment of 'enemy objectives' is permitted only when their total or partial destruction may benefit military operations, that bombardment of centres of population is permitted only when there exists a 'reasonable' presumption that they conceal military preparations or supplies 'such as to justify bombardment,' and that in no case may bombardment be resorted to for the sole purpose of penalising civil populations or of destroying or damaging property which is not of military importance.

<sup>3</sup> See on this subject, in addition to the works of Royse, Spaight, the *Consultations Juridiques* of eight jurists, and others, cited at the beginning of § 214a, Meyer, *Völkerrechtlicher Schutz der friedlichen Personen und Sachen gegen Luftangriffe* (1935) (with a bibliography); Debeyre in *R.G.*, xlv. (1939) pp. 600-618; *International Law Association Report*, 40 (1939), pp. 37-86.

on land and at sea.<sup>1</sup> It is a question of the subjection of a particular sphere of war to rules generally recognised to be the basis of the law of war. The immunity of non-combatants from direct attack is a principle of this nature. It has been recognised as such in the few instances in which international tribunals have been called upon to pronounce on the matter.<sup>2</sup> In the War of 1914-1918 the illegality, except by way of reprisals, of aerial bombardment directed exclusively against the civilian population for the purpose of terrorisation or otherwise seems to have been generally admitted by the belligerents,<sup>3</sup>—although this fact did not actually prevent attacks on centres of civilian population in the form either of reprisals or of attack against military objectives situated therein.

The application of this fundamental principle of the law of war to air warfare is seriously threatened owing mainly to three factors: (a) the enlargement of the scope of and the changes in the character of modern war, with its tendency to obliterate in many respects the distinction between combatants and non-combatants; (b) the resulting difficulty of determining what constitutes a military objective against which direct action is admissible; and (c) the technical difficulty, in regard to aerial bombardment, of confining the effects of hostile action to the intended or professed object of attack. However, these new problems raised by air warfare cannot be deemed to have affected the validity of

<sup>1</sup> It will be noticed that in the matter of bombardment the Hague Conventions adopted different rules for the bombardment of towns in land warfare (where the law has adopted the test of 'defence': see above, § 155) and in naval warfare (where the test of military objective has been adopted: see above, § 213). On the need for special rules for air warfare see Spaight, *Air*, pp. 31-38. See, on the other hand, *Coenca Brothers v. Germany*, decided in December 1927 by the Greco-German Mixed Arbitral Tribunal, *Annual Digest*, 1927-1928, Case No. 389, where the Tribunal applied to air warfare the provisions of Article 26 of Hague Convention No. IV. concerning warning before impending

bombardment. See also *Kiriadoulou v. Germany*, decided in May 1930 by the same Tribunal, *ibid.*, 1929-1930, Case No. 301.

<sup>2</sup> See *Coenca Brothers v. Germany* and *Kiriadoulou v. Germany*, referred to above, where the principle of respect for the life and property of civilian population was held to be of over-riding application. In both cases, which were concerned with a claim for damages on account of the bombardment of Salonica by German aircraft in 1916, the Tribunal went to the length of holding that the duty of previous notification, clearly recognised in respect of land and naval bombardment, applied by analogy to bombardment from the air.

<sup>3</sup> See Spaight, *Air*, pp. 198-206.

the general principle of immunity of non-combatants from direct attack. They are not such as to provide a legal justification for offensive action which, although disguised under the cloak of attack upon a military objective or as a measure of reprisals, is directed in fact exclusively or predominantly against the civilian population. Non-combatants are not, under existing International Law, a legitimate military objective. Undoubtedly, they do not enjoy absolute immunity. Their presence will not render military objectives immune from attack for the mere reason that it is impossible to bombard them without indirectly causing injury to the non-combatants. But, as in the case of self-defence or of other cases in which the law permits unavoidable invasion of a right for the prosecution of another right, it is of the essence that a just balance be maintained between the military advantage and the injury to non-combatants. The restrictions imposed by customary International Law upon the sinking of merchant-vessels<sup>1</sup> are one of the many examples of the principle that noxious, though otherwise lawful, action must be desisted from when its object cannot be obtained without causing disproportionate injury to legally recognised rights; and it is generally agreed that the continued validity of those restrictions is not impaired by the fact that the employment of a new weapon, the submarine, may sometimes render compliance with them embarrassing or destructive of the intended object of naval action.<sup>2</sup> The same principle applies to those cases in which the exigencies of war may compel the belligerent to have recourse to aerial bombardment by way of reprisals.<sup>3</sup>

The border-line between combatants and non-combatants

<sup>1</sup> For the application of that principle to the bombing of merchant-vessels by aircraft in case of refusal to submit to visit see Spaight, *Air*, p. 473. And see generally on the problem of new weapons Kunz, pp. 28, 29.

<sup>2</sup> See above, § 194a. And see *Coenra Brothers v. Germany*, cited above, where the Tribunal was confronted with the argument that bombardment from the air must,

from the military point of view, necessarily be a surprise if it is to be effective. The answer of the Tribunal was that if this were so the consequence would be, not that aerial bombardment without warning is permitted, but that it is altogether inadmissible.

<sup>3</sup> On reprisals in air warfare see Strupp in *Z.V.*, xvi. (1932) pp. 572-582.



is clearly not one that can be rigidly determined in advance. It may well be that sections of the civilian population, like munition workers, which are closely identified with military objectives proper, may, while so identified, be legitimately exposed to air attack and to other belligerent measures aiming at the destruction of the objectives in question.<sup>1</sup> But these unavoidable modifications, whose limits cannot be fixed in advance, do not affect the major principle of immunity of non-combatants. International Law protects non-combatants from indiscriminate bombardment from the air; recourse to such bombardment constitutes a war crime.

However, it is obvious that the civilian population cannot be protected from violations and abuses of International Law in regard to a weapon the limits of whose use are in practice not always easy to determine, and whose potentialities, if unchecked by fear of reprisals,<sup>2</sup> are a powerful

<sup>1</sup> See Spaight in *Air Law Review*, 9 (1938), pp. 372-376, who suggests the classification of non-combatants of this category as quasi-combatants.

The Nineteenth Assembly of the League adopted in September 1938 a resolution stating that although the bombing of civilian populations is prohibited under the general principles of International Law and that although that prohibition does not require further re-affirmation, it needs to be made the subject of regulations specially adapted to air warfare and taking into account the lessons of experience. The Assembly formulated the following principles as a necessary basis for any subsequent regulation of the matter:

(1) The intentional bombing of civilian populations is illegal.

(2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable.

(3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence: *Off. J.*, Special Suppl., 1938, No. 182, p. 16.

<sup>2</sup> That the fear of retaliation may constitute a powerful inducement to restraint was shown by the fact that on the outbreak of the war between Germany and Great Britain and

France in 1939 both sides scrupulously refrained from any action having as its object, even incidentally, the bombardment of the civilian population. In reply to an appeal by the President of the United States, and in fulfilment of an accord previously reached between the two Governments, a joint Anglo-French declaration was issued on September 2, 1939, affirming the intention of the two Governments, in the event of war, to conduct hostilities with a firm desire to spare the civilian population. On September 17 Germany took note of that Declaration and announced her intention to adhere to the same policy subject to reciprocity. For a time both sides abstained, with sporadic exceptions, from aerial bombardment of legitimate military objectives within the territories of the enemy. Subsequently enemy aerodromes became a frequent object of attack. When in May 1940 Germany, after the invasion of Norway, Holland, and Belgium, initiated on a wide scale the use of the aerial weapon for the purpose of bombardment, the British Government announced on May 10, 1940, with reference to the Declaration of September 1939, that it reserved the right to take appropriate action in the event of bombing by the enemy of civil populations in Great Britain,

inducement to ruthless violation of the law. There is therefore room for the view that only the total abolition of aerial bombardment, possibly coupled with the entire abolition of military and naval aviation, can provide a sufficient safeguard against the dangers of that form of warfare. A Resolution to that effect was adopted by the General Commission of the Disarmament Conference in July 1932,<sup>1</sup> and various Governments have made or supported proposals in that direction.<sup>2</sup>

France, or in countries assisted by Great Britain. Nevertheless, on May 18 the British Government re-affirmed the declaration made on September 14, 1939, to the effect that, no matter what the policy of Germany might be, Great Britain would not resort to bombardment directed exclusively against the civilian population.

Experience has shown that in the absence of the restraining influence of fear of effective reprisals belligerents have not hesitated to make use of the superiority of their air arm in a manner violative of the prohibition to bombard the civilian population. The German campaign in Poland in August and September 1939 affords an instructive example of this phenomenon. On aerial bombardment in the Italo-Abyssinian War of 1935-1936 see Nostitz-Wallwitz in *Z.ö.V.*, vi. (1936) pp. 703-716; Kroell in *R.G.D.A.*, 5 (1936), pp. 178-216 (a one-sided account); Spencer, *ibid.*, 7 (1938), pp. 7-20, and in *A.S. Proceedings*, 1937, pp. 95-108; in the Spanish Civil War of 1936-1939 see Le Goff in *R.G.*, xlv. (1938) pp. 581-606; Kroell in *R.G.D.A.*, 7 (1938), pp. 155-168, 580-608. For the Report of the Commission appointed by the British Government for the investigation of air bombardment in Spain see *Off. J.*, 1939, pp. 28-34. On aerial bombardment in the Chaco war between Bolivia and Paraguay see Kroell in *R.G.D.A.*, 4 (1935), pp. 226-233. See, on aerial bombardment, in addition to the literature referred to above at p. 406, Röhrig, *Die Ziele selbständiger Luftangriffe* (1938); Charpentier, *L'Humanisation de la Guerre aérienne* (1938); Rapisardi-Mirabelli in *Rivista di diritto aeronautico*, 1935, pp. 8-13; Thomson in *Juridical Review*, 48

(1936), pp. 48-56; Gullion in *R.G.D.A.*, 7 (1938), pp. 398-417; Meyer, *ibid.*, 8 (1939), pp. 38-67, and in *R.I. (Paris)*, xiii. (1939) pp. 108-137.

<sup>1</sup> The Resolution recommended that the parties to the proposed Disarmament Convention should agree as between themselves that all bombardment from the air shall be abolished, subject to the adoption of measures calculated to render such abolition effective, namely, the limitation 'by number' and 'by characteristics' of military aircraft, submission of civil aircraft to regulation and full publicity, and subjection to international supervision of civil aircraft not conforming to the specified limitations: League Doc. 1932.IX. 63, pp. 268-271; *Documents*, 1932, p. 179.

<sup>2</sup> Thus Article 34 of the British Draft Disarmament Convention of March 1933, subsequently adopted as a basis of the discussions of the Conference, provided as follows: 'The High Contracting Parties accept the complete abolition of bombing from the air (except for police purposes in certain outlying regions).' In Article 35 proposals were made for working out schemes either for the complete abolition of military and naval aircraft coupled with effective supervision of civil aviation or for its limitation in case of impossibility of ensuring effective supervision: League Doc. Conf. D/163; Cmd. 4279; *Documents*, 1933, p. 173. And see *ibid.* for the amendments and proposals of other Governments. See also Cmd. 4189 containing the British declaration of policy on the matter, submitted to the Conference in November 1932. For comment on the British proposal see Spaight, *Air*, pp. 258, 259.

Attack on  
Enemy  
Civil  
Aircraft.

§ 214f. While the principle of immunity of non-combatants from direct attack undoubtedly applies in relation to civil aircraft, the danger of surprise on the part of apparently inoffensive civil aircraft will probably impose upon the latter special restraints as the price of immunity. Article 33 of the Hague Rules lays down that belligerent non-military aircraft are liable to be fired upon 'unless they make the nearest available landing on the approach of enemy military aircraft.' Article 34 provides that such aircraft are liable to be fired upon if they fly '(1) within the jurisdiction of the enemy, or (2) in the immediate vicinity thereof and outside the jurisdiction of their own state, or (3) in the immediate vicinity of the military operations of the enemy by land or sea.'<sup>1</sup> These obligations of caution on the part of enemy civil aircraft do not appear to be excessive seeing that it is generally agreed that in the interest of his security and of the success of his operations the belligerent may impose far-reaching restrictions upon the movements of neutral aircraft over both land and sea.<sup>2</sup>

Aircraft  
Attack  
on Enemy  
Merchant-  
Vessels.

§ 214g. The prohibition of direct attack upon non-combatants which underlies the law relating to the bombing of the civilian population on land and in civil aircraft applies with even greater cogency to bombardment of enemy merchant-vessels. While with regard to civilians

<sup>1</sup> For a criticism of these Rules see Spaight, *Air*, p. 381. Possibly Article 33 includes the case of civil aircraft disregarding the belligerent's orders or signals. According to the Italian War Regulations enemy civil aircraft may be attacked for the following reasons: (1) if they fly over Italian territory; (2) if they commit acts of hostility directly or by conveying information; (3) if they resist search or capture; (4) if they give signals although ordered not to do so; (5) if they refuse to change their course as ordered; and (6) generally, if they refuse to comply with lawful orders (Article 234 (2)). The Japanese Government apparently relied on the relevant Hague articles in connection with the firing by Japanese aircraft on an air liner belonging to the China National Aviation Corporation on

August 4, 1938, in the course of the Sino-Japanese hostilities. Fourteen of the occupants (including three women and two children) lost their lives. While there might have been some justification for the firing if, as alleged by the Japanese Government, the liner had been encountered in the vicinity of military operations and if no previous notice had been given to the Japanese authorities of the time of departure and the intended course of the air liner, there was—as rightly pointed out by Spaight in *B.Y.*, xx. (1939) p. 124—no justification for firing at the liner after it had been forced down or after it had become clear that it was coming down.

<sup>2</sup> See Hague Air Rules, Articles 30, 35, 50, and 51. And see Spaight, *Air*, pp. 383-386; *Harvard Research* (1939), pp. 773-775.

on land there exists the undoubted difficulty of reconciling their immunity with the right to attack military objectives, and while in the case of civil aircraft the element of ruse and surprise calls for special precautionary rules, no such complications arise in the case of enemy merchantmen. The fact that the merchant-vessel is armed for the purposes of defence does not alter the legal situation. This is so on the ground that the reasons which, in relation to submarines, have been adduced as excluding the acquisition of belligerent status by defensively armed merchant-vessels<sup>1</sup> apply with special vigour in their relation to enemy aircraft. For in the case of aircraft, the exercise of the normal rights of visit, search, and capture—which right is said to be jeopardised or rendered nugatory by the fact of the defensive armament of the merchantman—is even less capable of accomplishment consistently with the accepted rules of International Law than in the case of submarines. Although it is theoretically possible for aircraft to conduct both visit and search and although there are instances of the exercise of these rights by aircraft,<sup>2</sup> the surrounding difficulties are such as to render the practical effectiveness of these rights negligible.<sup>3</sup> Such part as aircraft may legitimately play in the war upon enemy commerce is probably that of an auxiliary arm of the naval forces proper.

During the World War attacks by aircraft upon shipping, although not infrequent, did not constitute a prominent feature of the war. The Spanish Civil War of 1936-1939 revealed the potentialities of this aspect of air warfare, and the supplementary Nyon Agreement of September 17, 1937,<sup>4</sup> declared that the principles underlying the provisions

<sup>1</sup> See above, § 181a.

<sup>2</sup> See Spaight, *Air*, pp. 466-474; *Harvard Research* (1939), p. 782.

<sup>3</sup> See Smith in *B.Y.*, xvii. (1936) pp. 37-44, and in *Hague Recueil*, 63 (1938) (i.), pp. 672-681. See also Richmond, *Sea Power in the Modern World* (1934), pp. 113-116, and *Harvard Research* (1939), pp. 778-782. The Hague Air Rules contain no provision bearing on the matter as the Commission was unable to reach agreement.

<sup>4</sup> (1937) Cmd. 5569. See Lauter-

pacht in *R.G.*, lvi. (1939) pp. 513-549, for an affirmative answer to the question whether acts of lawlessness of this nature may properly be described as piratical although the persons responsible for such acts are duly commissioned. But see Genet in *A.J.*, xxxii. (1938) pp. 253-263; Anonymous in *B.Y.*, xix. (1938) pp. 198-208; Wirwart in *R.I.*, 3rd ser., xix. (1938) pp. 341-351. See also Padelford in *A.J.*, xxxii. (1938) pp. 271-279; and Finch, *ibid.*, xxx.

of the London Treaty of 1930 and of the Protocol of 1936 relating to submarines<sup>1</sup> supplied an adequate legal basis for summary repression of similar attacks by aircraft. Several months after the outbreak of the war in 1939 Germany proceeded to resort on a wide scale to indiscriminate attacks by aircraft upon merchant shipping, including fishing craft and lightships.<sup>2</sup> In the attack on the *Domala*, a ship of the British Indian line, in March 1940, one hundred passengers and members of the crew were killed. Such depredations when directed against unconvoyed vessels not forming part of the naval forces of the belligerent must be regarded as constituting a flagrant violation of International Law.<sup>3</sup>

Liability  
of Civil  
Aircraft  
to  
Capture.

§ 214h. Civil enemy aircraft, and the goods carried therein, are liable to capture according to the same principles which apply to capture of enemy vessels and of enemy property on the high seas. In addition to the reasons which have customarily been regarded as justifying the capture of vessels and which apply with particular cogency to modern warfare, there is in regard to aircraft the possibility of its speedy conversion into military aircraft proper or non-military aircraft for purposes closely connected with the conduct of the war. The British Prize Act, 1939,<sup>4</sup> in applying the law of prize to aircraft and goods carried therein, asserts to the full extent the right of capture of civil aircraft. The same applies to the legislation of other States, like the Italian War Regulations of 1938<sup>5</sup> or the Scandinavian Neutrality Rules of 1938.<sup>6</sup>

(1937) pp. 659-665. The Italian War Regulations of 1938 provide that the rules relating to capture in maritime war shall apply also to the operations of aircraft against vessels. They also laid down that the aircraft must desist from visit and search if it is unable to exercise these rights in accordance with the rules obtaining in war at sea (Articles 232 and 233 (2)).

<sup>1</sup> See above, § 194a.

<sup>2</sup> In addition, German aircraft resorted to bombing lighthouses.

<sup>3</sup> Dr. Spaight, *Air*, pp. 472, 473, gives persuasive reasons in favour of the view that bombing—as distin-

guished from shelling—of merchant-vessels ought to be prohibited even in cases of refusal to submit to search or in case of convoy by men-of-war.

<sup>4</sup> See below, § 435a.

<sup>5</sup> Article 239 lays down that private enemy aircraft is liable to capture as well as aircraft which bears no insignia or false insignia of nationality.

<sup>6</sup> Thus, for instance, Article 9 of the Norwegian Rules (see above, p. 183) prohibits the arrest, visit, and capture of vessels and of aircraft within neutral territory. It apparently assumes the exercise of such action by and against aircraft.

## CHAPTER V

### NON-HOSTILE RELATIONS OF BELLIGERENTS

#### I

##### ON NON-HOSTILE RELATIONS IN GENERAL BETWEEN BELLIGERENTS

Grotius, iii. c. 19—Pufendorf, viii. c. 7, §§ 1-2—Bynkershoek, *Quaestiones Juris publici*, i. c. 1—Vattel, iii. §§ 174-175—Hall, § 189—Lawrence, § 210—Phillimore, iii. § 97—Halleck, ii. pp. 345-346—Taylor, § 508—Wheaton, § 399—Bluntschli, § 679—Heffter, § 141—Lueder in *Holtzendorff*, iv. pp. 525-527—Ullmann, § 185—Fauchille, §§ 1237, 1238, 1359 (66)-1359 (71)—Despagnet, No. 555—Pradier-Fodéré, vii. Nos. 2882-2887—Rivier, ii. p. 360—Nys, iii. p. 473—Calvo, iv. §§ 2411-2412—Fiore, iii. No. 1482, and *Code*, Nos. 1744-1746—Martens, ii. § 127—Longuet, §§ 134-135—Mérignhac, iii<sup>a</sup>. pp. 358-360—Pillet, pp. 355-356—Gemma, pp. 335, 336—Hyde, ii. § 638—Holland, *Lectures*, pp. 367, 374—*Kriegsbrauch*, p. 38—*Land Warfare*, §§ 221-223—Emanuel, *Les conventions militaires dans la guerre continentale* (1904).

§ 215. Although the outbreak of war between States as *Fides etiam hosti servanda* a rule brings non-hostile intercourse to an end, necessity of circumstances, convenience, humanity, and other factors call, or may call, some kinds of non-hostile relations of belligerents into existence. And it is a universally recognised principle of International Law that, where such relations arise, belligerents must carry them out in good faith. *Fides etiam hosti servanda* is a rule which was adhered to in antiquity, when no International Law in the modern sense of the term existed. But it had then a religious and moral sanction only. Since in modern times war is not a condition of anarchy and lawlessness between belligerents, but a contention in many respects regulated, restricted, and modified by law, it is obvious that, where non-hostile relations between belligerents occur, they are protected by law. *Fides etiam hosti servanda* is, therefore, a principle which nowadays enjoys a legal as well as a religious and moral sanction.

Different  
Kinds of  
Non-  
Hostile  
Relations.

§ 216. As through the outbreak of war all diplomatic<sup>1</sup> intercourse and other non-hostile relations come to an end, it is obvious that non-hostile relations between belligerents must originate, either from special rules of International Law, or from special agreements between the belligerents.

No special rules of International Law demanding non-hostile relations between belligerents existed in former times; but of late a few rules of this kind have arisen. Thus, for instance, release on parole<sup>2</sup> of prisoners of war (when the law of their own country authorises the giving of parole) creates an obligation on the part of the enemy not to re-admit them into the forces while the war lasts. To give another example, by Article 4 of the Geneva Convention of 1906, and Article 14 of the Hague Regulations—see also Article 17 of Hague Convention X.—it is the duty of either belligerent to return to the enemy, through his prisoners-of-war bureau, all objects of personal use, letters, jewellery, and the like, found on the battlefield or left by those who died in hospital.<sup>3</sup> Non-hostile relations of this kind, however, need not be considered in this chapter, since they have already been discussed.

Non-hostile relations may also originate from special agreements between belligerents (so-called *commercias belli*), concluded either in time of peace for the purpose of creating certain non-hostile relations in case war breaks out, or during a war. Such non-hostile relations are created through passports, safe-conducts, safeguards, flags of truce, cartels, surrender, capitulations, and armistices, and also by peace negotiations.<sup>4</sup> Each kind must be discussed separately.

Licences  
to Trade.

§ 217. Several writers<sup>5</sup> speak of the creation of non-hostile relations between belligerents by limited or general licences to trade granted by a belligerent to enemy subjects.

<sup>1</sup> There is no doubt that all *direct* diplomatic intercourse comes to an end; but indirect diplomatic intercourse may nevertheless go on through the legations of neutral Powers. By this means a great number of arrangements were made during the World War between the Allies and the Central Powers.

<sup>2</sup> See above, § 129.

<sup>3</sup> See above, § 144.

<sup>4</sup> See below, § 267.

<sup>5</sup> See, for instance, Hall, § 196; Halleck, ii. pp. 371-388; Lawrence, § 214; Manning, p. 168; Taylor, § 512; Wheaton, §§ 409-410; Fiore, iii. No. 1500; Pradier-Fodéré, vii. No. 2937.

It has been explained above <sup>1</sup> that it is for Municipal Law to determine whether or not through the outbreak of war all trade and the like is prohibited between the subjects of belligerents. If the Municipal Law of one or both belligerents does contain such a prohibition, it is of course within his or their discretion to grant exceptional licences to trade to their own or the other belligerent's subjects, and such licences naturally include certain privileges. Thus, for instance, if a belligerent allows enemy subjects to trade with his own subjects, enemy merchantmen engaged in such trade are exempt from capture and appropriation by him.<sup>2</sup>

## II

### PASSPORTS, SAFE-CONDUCTS, SAFEGUARDS

Grotius, iii. c. 21, §§ 14-22—Vattel, iii. §§ 265-277—Hall, §§ 191, 195—Lawrence, § 213—Phillimore, iii. §§ 98-102—Hershey, p. 400, n. 68—Halleck, ii. pp. 358-361—Taylor, § 511—Wheaton, § 408—Moore, vii. §§ 1158-1159—Bluntschli, §§ 675-678—Heffter, § 142—Lueder in *Holtzendorff*, iv. pp. 525-529—Ullmann, § 185—Fauchille, §§ 1246-1247—Despagnet, Nos. 558-561—Pradier-Fodéré, vii. Nos. 2884, 2932-2933—Nys, iii. pp. 477-478—Calvo, iv. §§ 2413-2418—Fiore, iii. No. 1499, and *Code*, Nos. 1765-1772—Longuet, §§ 142-144—Mérignac, iii<sup>a</sup>. pp. 384-386—Pillet, pp. 359-360—Rolin, §§ 405-406—Hyde, ii. §§ 640-642—*Kriegsbrauch*, p. 41—Holland, *War*, No. 101—*Land Warfare*, §§ 326-337.

§ 218. One belligerent on occasions arranges that pass-ports and safe-conducts shall be given to certain subjects of another. Passports and Safe-Conducts.

A passport is a written permission given by a belligerent

<sup>1</sup> § 101.

<sup>2</sup> See below, § 224. 'Licences to trade' are now mainly a matter of historical interest. They may be granted by a belligerent either to his own subjects (*The Cousin Marianne* (1810) Edwards, 346), or to enemy subjects (*The Acteon* (1815) 1 Dod. 480; *Usparicha v. Noble* (1811) 13 East 332; *Flindt v. Scott* (1814) 5 Taunt. 674), or to neutral subjects (*The Dankbaarheid* (1812) 1 Dod. 183; and see Hall, § 196). For cases during the World War see *Salti et Fils v. H.M. Procurator-General* [1919] A.C. 968; 3 B. and C.P.C.

374; *The Rannveig* [1922] 1 A.C. 97; 3 B. and C.P.C. 1013; *Manual of Emergency Legislation* (1914), pp. 381-383; McNair, *Legal Effects of War* (1920), p. 102 (as to procuring books of enemy origin). As to the rights of action in English courts conferred by a licence to trade see above, § 100 (n.). As to the effect of licences to trade granted by a belligerent to his own subjects pending the ratification of a treaty of peace see Beckett in *Law Quarterly Review*, xxxix. (1923) pp. 89-97, and *Kotzias v. Tyser* [1920] 2 K.B. 69.



to enemy subjects or others, allowing them to travel within his territory, or enemy territory occupied by him.

A safe-conduct is a written permission given by a belligerent to enemy subjects or others, allowing them to proceed to a particular place for a defined object ; for instance, to a besieged town for conducting certain negotiations, or to enable them to return home across the sea.<sup>1</sup> Safe-conducts may also be given for ships<sup>2</sup> and for goods, to allow them to be navigated and carried without molestation to a certain place. But a safe-conduct given to an individual does not, unless it is expressly stated, cover goods which he may carry with him.<sup>3</sup>

Passports and safe-conducts make the grantee inviolable so long, and in so far, as he complies with the conditions specially imposed upon him, or made necessary by the circumstances of the special case. They are not transferable, and may be granted for a limited or an unlimited period ; in the former case their validity ceases with the expiration of the period. They may be withdrawn, not only when the grantee abuses the protection, but also for military expediency. Moreover, they are only a matter of International Law when the granting of them has been arranged between the belligerents or their responsible commanders, or between belligerents or neutral Powers. If they are granted by one of the belligerents, acting unilaterally and without such an arrangement, they would seem to fall outside the scope of International Law.<sup>4</sup>

Safe-  
guards.

§ 219. One belligerent sometimes arranges to grant protection against his forces to certain subjects or property of

<sup>1</sup> Thus, during the World War, in 1915 Dr. Dumba, the retiring Austrian ambassador, and in 1917 Count Bernsdorff, the retiring German ambassador, to the United States, received safe-conducts for returning home on neutral vessels calling at British ports : see vol. i. § 398.

<sup>2</sup> See *The Batori* [1933] P. 22 ; [1934] A.C. 91. The term 'safe-conduct' was also applied during the World War to the authorisations granted by the German Government to vessels chartered by the Belgian Relief Mission, in spite of which many

of them were sunk by German submarines : see Garner, i. §§ 328-330. See above, § 186 (n.).

<sup>3</sup> Thus when in 1915, during the World War, Captain von Papen, military attaché to the German Embassy at Washington, secured a safe-conduct from Great Britain to return home, his luggage was searched at Falmouth, and important papers, throwing light upon his conspiracies in the United States, were seized.

<sup>4</sup> This distinction would seem to be necessary, although it is not generally made.

another belligerent in the form of safeguards, of which there are two kinds. One consists of a written order, given to an enemy subject or left with enemy property, addressed to the commander of armed forces of the grantor, and charging him with the protection of the individual or the property. Thereby he or it becomes inviolable. The other kind of safeguard is given by detailing one or more soldiers to accompany enemy subjects, or to guard the spot where certain enemy property is, for the purpose of protection. Soldiers on this duty are inviolable on the part of the other belligerent; they must neither be attacked nor made prisoners, and they must, on falling into the hands of the enemy, be fed, well kept, and eventually safely sent back to their corps. Safeguards, like passports and safe-conducts, are only a matter of International Law when the granting of them has been arranged by the belligerents, or when they fall under Articles 9 and 10 of the Geneva Convention of 1929,<sup>1</sup> and not otherwise.

### III

#### FLAGS OF TRUCE

Grotius, iii. c. 24, § 5—Hall, § 190—Lawrence, § 211—Westlake, ii. p. 91—Hershey, No. 384—Moore, vii. § 1157—Phillimore, iii. § 115—Halleck, ii. pp. 369-370—Taylor, § 510—Bluntschli, §§ 681-684—Heffter, § 141—Lueder in *Holtzendorff*, iv. pp. 421-423—Ullmann, § 180—Fauchille, §§ 1239-1245—Despagnet, Nos. 556-557—Pradier-Fodéré, vii. Nos. 2927-2931—Rivier, ii. pp. 279-280—Nys, iii. pp. 474-476—Calvo, iv. §§ 2430-2432—Fiore, iii. No. 1378, and *Code*, Nos. 1500-1505—Martens, ii. § 127—Longuet, §§ 136-138—Mérignhac, iii<sup>a</sup>. pp. 361-366—Pillet, pp. 356-358—Zorn, pp. 195-199—Meurer, ii. §§ 39-40—Bordwell, pp. 293, 294—Spaight, *Land*, pp. 216-231—Spaight, *Air*, pp. 349-358—Rolin, §§ 402-404—Hyde, ii. § 639—*Kriegsbrauch*, pp. 26-29—Holland, *War*, Nos. 88-91—*Land Warfare*, §§ 224-255.

§ 220. Certain circumstances and conditions make it necessary or convenient for the armed forces of belligerents to enter into negotiations for various purposes. From time immemorial a white flag has been used as a symbol by an armed force wishing to negotiate with the enemy, and

Meaning  
of Flags  
of Truce.

<sup>1</sup> See above, § 123.

always and everywhere it has been considered a duty of the enemy to respect this symbol. In land warfare the flag of truce is used in the following manner.<sup>1</sup> An individual—soldier or civilian—charged with the task of negotiating with the enemy, approaches the latter, either carrying the flag himself or accompanied by a flag-bearer, and often also by a drummer, a bugler, or a trumpeter, and an interpreter. In sea warfare the individual charged with the task of negotiating approaches the enemy in a boat flying the white flag. The Hague Regulations, by Articles 32 to 34, enacted most of the customary rules of International Law regarding flags of truce without adding any new rule. These rules are the same for land warfare as for sea warfare, although their validity for land warfare is now grounded on the Hague Regulations, whereas their validity for sea warfare is still based on custom only.<sup>2</sup>

Treat-  
ment of  
Unadmit-  
ted Flag-  
Bearers.

§ 221. As a commander of an armed force is not, according to Article 33 of the Hague Regulations, compelled to receive a bearer of a flag of truce, a flag-bearer who makes his appearance may at once be signalled to withdraw. Yet even then he is inviolable from the time he displays the flag to the end of the time necessary for withdrawal. During this time he may neither be intentionally attacked nor made prisoner. However, an armed force in battle is not obliged to stop its military operations on account of the approach of an enemy flag-bearer who has been signalled to withdraw. Although he may not be fired upon intentionally, should he be wounded or killed accidentally during the battle no responsibility or moral blame would rest upon the belligerent concerned. A commander must never, except in a case of reprisals, declare beforehand, even only for a specified period, that he will not receive a bearer of a flag of truce.<sup>3</sup>

Treat-  
ment of  
Admitted  
Flag-  
Bearers.

§ 222. Bearers of flags of truce and their parties, when admitted by the other side, must be granted the privilege of inviolability. They may neither be attacked nor taken

<sup>1</sup> See Hague Regulations, Article 32.

<sup>2</sup> As to flags of truce in aerial warfare see Spaight, *Air*, pp. 349-358.

<sup>3</sup> This becomes quite apparent

from the discussions at the First Hague Conference; see Martens, *N.H.G.*, 2nd ser., xxvi. p. 466; *Land Warfare*, § 234; Spaight, *Land*, pp. 221-223.

prisoners, and they must be allowed to return safely in due time to their own lines. But they need not be allowed to acquire information about the receiving forces, and may, therefore, be blindfolded by them, or be conducted by roundabout ways, or be prevented from entering into communication with individuals other than those who confer officially with them; and they may even be temporarily prevented from returning, until a certain military operation of which they have obtained information is carried out. Article 33 of the Hague Regulations specifically enacts that a commander to whom a flag of truce is sent 'may take all steps necessary to prevent the envoy taking advantage of his mission to obtain information.' Bearers of flags of truce are not, however, prevented from reporting information they have gained by observation while passing through the enemy lines and in communicating with enemy individuals. But they are not allowed to sketch maps of defences and positions, to gather information secretly and surreptitiously, to provoke or to commit treacherous acts, and the like. If they do, they may be court-martialled. Articles 33 and 34 of the Hague Regulations expressly enact that a flag-bearer may be temporarily detained in case he abuses his mission for the purpose of obtaining information, and that he loses all privileges of inviolability 'if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery.' Bearers of white flags and their party must carry<sup>1</sup> some authorisation with them, to show that they are charged with the task of entering into negotiations (Article 32); otherwise they may be detained as prisoners, since it is his mission, and not the white flag itself, which protects the flag-bearer. This mission protects every one who is charged with it, whatever his rank and whether a civilian or a soldier; but it does not protect a deserter. A deserter may be detained, court-martialled, and punished, notice being given to the army sending him of the reason of his punishment.<sup>2</sup>

<sup>1</sup> Article 32 of the Hague Regulations confirms this customary rule by speaking of an individual who is 'authorised' by one of the belli-

gerents to enter into communication with the other. See Balladore Pallieri, pp. 239-244.

<sup>2</sup> See Hall, § 190.

Abuse of  
Flag of  
Truce.

§ 223. Different from abuse of his mission by an authorised flag-bearer is abuse of the flag of truce itself, which may take one of two different forms :

(1) The force which sends an authorised flag-bearer to the enemy must take up a corresponding attitude, the ranks which the flag-bearer leaves being obliged to halt and to cease fire. It constitutes an abuse of the flag of truce if it intentionally fails to do so. The case is even worse when a flag-bearer is intentionally sent on a feigned mission in order that military operations may be carried out under cover of the protection due from the enemy to the flag-bearer and his party.<sup>1</sup>

(2) A white flag is liable to be used to make the enemy believe that a flag of truce is about to be sent, although it is not sent, so that operations may be carried out under the protection granted by the enemy to this pretended flag of truce.

Both forms of abuse are gross perfidy, and may be met with reprisals, or with punishment of the offenders in case they fall into the hands of the enemy.

#### IV

#### CARTELS AND CARTEL SHIPS

Grotius, iii. c. 21, §§ 23-30—Vattel, iii. §§ 278-286—Hall, § 193—Lawrence, § 212—Westlake, ii. p. 162—Phillimore, iii. §§ 111-112—Halleck, ii. pp. 361-364—Taylor, § 509—Bluntschli, §§ 679-680—Heffter, § 142—Lueder in *Holtendorff*, iv. pp. 525-529—Ullmann, § 185—Fauchille, §§ 827, 1323 (1), 1395 (5)—Despagnet, No. 658—Pradier-Fodéré, vii. Nos. 2832.

<sup>1</sup> A case of this kind is related in Halleck, 3rd ed., ii. p. 315. 'On July 12, 1882, while the British fleet was lying off Alexandria, in support of the authority of the Khedive of Egypt, and the rebels under Arabi Pasha were being driven to great straits, a rebel boat, carrying a white flag of truce, was observed approaching H.M.S. *Invincible* from the harbour, whereupon H.M. ships *Temeraire* and *Inflexible*, which had just commenced firing, were ordered to suspend fire. So soon as the

firing ceased, the boat, instead of going to the *Invincible*, returned to the harbour. A flag of truce was simultaneously hoisted by the rebels on the Ras-el-Tin fort. These deceits gave the rebels time to leave the works and to retire through the town, abandoning the forts, and withdrawing the whole of their garrison under the flag of truce.' Spaight, *Land*, p. 229, denies that this was a case of abuse of the white flag.

2837, 2888—Rivier, ii. p. 360—Nys, iii. pp. 484-487—Calvo, iv. §§ 2419-2421—Longuet, §§ 140, 141—Pillet, pp. 358, 359—Hyde, ii. § 644—*Kriegsbrauch*, p. 38—Holland, *War*, No. 100, and *Prize Law*, §§ 32-35—*Land Warfare*, §§ 338-339—Kirchenheim in *Strupp*, *Wört.*, i. pp. 624-626.

§ 224. Cartels are conventions between belligerents concluded for the purpose of permitting certain kinds of non-hostile intercourse between them which would otherwise be prevented by war. Cartels may be concluded during peace in anticipation of war, or during a war, and they may provide for numerous purposes. Thus, communication by post, telegraph, telephone, and railway, which would otherwise not take place, can be arranged by cartels, as can also the exchange of prisoners, or certain treatment for the wounded, and the like. Thus, further, intercourse between their subjects through trade<sup>1</sup> can, either with or without limits, be agreed upon by belligerents. All rights and duties originating from cartels must be complied with in the same manner and good faith as rights and duties arising from other treaties.

Definition  
and Purpose  
of  
Cartels.

§ 225. Cartel ships<sup>2</sup> are vessels of belligerents which are commissioned for the carriage by sea of exchanged prisoners from the enemy country to their own country, or for the carriage of official communications to and from the enemy. Custom has sanctioned a body of rules<sup>3</sup> regarding cartel ships for the purpose of securing protection for them and also securing their exclusive employment as a means for the exchange of prisoners.

Cartel  
Ships.

<sup>1</sup> See above, § 217. But arrangements for granting passports, safe-conducts, and safeguards—see above, §§ 218 and 219—are not a matter of cartels.

<sup>2</sup> See above, § 190.

<sup>3</sup> They must not do any trade, or carry any cargo or despatches (*The La Rosina* (1800) 2 C. Rob. 372; *The Venus* (1803) 4 C. Rob. 355); they are, in particular, not allowed to carry ammunition or instruments of war, except one gun for firing signals. They must be furnished with a proper document declaring that they are commissioned as cartel ships. They are under the protection

of both belligerents, and may neither be seized nor appropriated. They enjoy this protection, not only when actually carrying exchanged prisoners or official communications, but also on their way home after such carriage and on their way to fetch prisoners or official communications (*The Daifje* (1800) 3 C. Rob. 139; *The La Gloire* (1804) 5 C. Rob. 192). They lose it at once, and may consequently be seized and be appropriated, in case they do not comply either with the general rules regarding cartel ships or with the special conditions imposed upon them.

## V

## CAPITULATIONS AND SIMPLE SURRENDER

Grotius, iii. c. 22, § 9—Vattel, iii. §§ 261-264—Hall, § 194—Lawrence, § 215—Westlake, ii. p. 91—Phillimore, iii. §§ 122-126—Halleck, ii. pp. 354-357—Taylor, §§ 514-516—Wheaton, § 405—Moore, vii. § 1160—Bluntschli, §§ 697-699—Heffter, § 142—Lueder in *Holtzendorff*, iv. p. 527—Ullmann, § 185—Fauchille, §§ 1259-1267—Despagnet, No. 562—Pradier-Fodéré, vii. Nos. 2917-2926—Rivier, ii. pp. 361-362—Nys, iii. pp. 487-491—Calvo, iv. §§ 2450-2452—Fiore, iii. Nos. 1495-1497, and *Code*, Nos. 1756-1763—Martens, ii. § 127—Longuet, §§ 151-154—Mérignhac, iii<sup>a</sup>. pp. 366-373—Pillet, pp. 360-364—Bordwell, p. 294—Meurer, ii. §§ 41-42—Holland, *Lectures*, pp. 369-370—Spaight, *Land*, pp. 249-259—Rolin, §§ 407-416—Hyde, ii. § 643—*Kriegsbrauch*, pp. 38-41—Holland, *War*, No. 92—*Land Warfare*, §§ 301-325—Sibert in *R.G.*, xl. (1933) pp. 692-698.

Character  
and  
Purpose  
of Capitula-  
tions, in  
contra-  
distinc-  
tion to  
Simple  
Sur-  
render.

§ 226. Capitulations are conventions between armed forces of belligerents stipulating the terms of surrender of fortresses and other defended places, or of men-of-war, or of troops. It is, therefore, necessary to distinguish between a *simple* and a *stipulated* surrender. If one or more soldiers lay down their arms and surrender, or if a fortress or a man-of-war surrenders without making any terms whatever, there is no capitulation, for a capitulation is a convention stipulating special terms of surrender.

Capitulations are military conventions only and exclusively; they must not, therefore, contain arrangements other than those of a local and military character concerning the surrendering forces, places, or ships. If they do contain such arrangements, the latter are not valid, unless they are ratified by the political authorities of both belligerents.<sup>1</sup> The surrender of a certain place or force may, of course, be arranged by some convention containing other than military stipulations, but then such surrender would not originate from a capitulation. Just as the character of capitulations is merely military, so is their purpose—the abandonment of a hopeless struggle and of resistance which would only involve useless loss of life on the part of a hope-

<sup>1</sup> See Phillimore, iii. § 123, who discusses the promise of Lord William Bentinck to Genoa, in 1814, regarding its independence, which was disowned by the British Government.

Phillimore himself disapproves of the attitude of Great Britain, and so do some foreign writers, as, for instance, Despagnet (No. 562).

lessly beset force. Therefore, whatever may be the indirect consequences of a capitulation, its direct consequences have nothing to do with the war at large, but are local only, and concern the surrendering force exclusively.

§ 227. Unless otherwise expressly provided, a capitulation is concluded under the obvious condition that the surrendering forces become prisoners of war, and that all war material and other public property in their possession, or within the surrendering place or ship, are surrendered in the condition in which they were at the time when the capitulation was signed. Nothing prevents forces fearing surrender from destroying their provisions, munitions, arms, and other instruments of war which, when falling into the hands of the enemy, would be useful to him. Again, nothing prevents a commander, even after negotiations regarding surrender have begun, from destroying such articles. But when once a capitulation has been signed,<sup>1</sup> such destruction is no longer lawful, and if carried out, constitutes perfidy, which may be punished by the other party as a war crime.

Contents  
of Capitu-  
lations.

But special conditions may be agreed upon between the forces concerned, and they must then be faithfully adhered to by both parties. The only rule which Article 35 of the Hague Regulations enacts regarding capitulations is that they must be in accordance with the demands of military honour, and, when once settled, must be scrupulously observed. Among possible conditions may be one that the convention shall be valid only if within a certain period relief troops are not approaching, or one that the surrendering forces shall not in every respect be treated like ordinary prisoners of war. There are even instances<sup>2</sup> of capitulations

<sup>1</sup> When, during the Russo-Japanese War, in January 1905, General Stoessel, the commander of Port Arthur, had fortifications blown up and vessels sunk, during negotiations for surrender, but before the capitulation was signed, the press undeservedly accused him of perfidy. U.S. Naval War Code, Article 52, enacted the right principle: '*after agreeing upon or signing a capitulation, the captulator must neither injure nor destroy the vessels,*

*property, or stores in his possession that he is to deliver up, unless the right to do so is expressly reserved to him in the agreement of capitulation.*'

<sup>2</sup> During the Franco-German War the Germans granted these most favourable conditions to the French forces that surrendered Belfort on February 15, 1871. And see Sibert, *op. cit.*, on the modern tendency to identify capitulations with armistices and preliminaries of peace.



which stipulated that the surrendering forces should leave the place with full honours, carrying their arms and baggage away, and joining their own army, unmolested by the enemy through whose lines they had to march.<sup>1</sup>

Form of  
Capitula-  
tions, and  
of Simple  
Sur-  
render.

§ 228. No rule of International Law exists regarding the forms of capitulations, which may, therefore, be concluded either orally or in writing. But they are usually concluded in writing. Negotiations for capitulation, from whichever side they emanate, are usually sent under a flag of truce. On the other hand, a force which is ready to surrender without special conditions of surrender, *i.e.* without a capitulation, can indicate their intention by hoisting a white flag as a signal that they abandon all resistance. The question whether the enemy must at once cease firing and accept the surrender is to be answered in the affirmative, provided that he is certain that the white flag was hoisted by order, or with the authority, of the commander of the force. As, however, such hoisting may well have taken place without the authority of the commander, and may, therefore, be disowned by him, no duty exists for the enemy to cease his attack until he is convinced that the white flag really indicates the intention of the commander to surrender.

Compe-  
tence to  
conclude  
Capitula-  
tions.

§ 229. The competence to conclude capitulations is vested in the commanders of the forces opposing each other. Capitulations entered into by unauthorised subordinate officers may, therefore, be disowned by the commander without breach of faith. As regards the special conditions of capitulations, it must be particularly noted that the competence of a commander to grant them is limited<sup>2</sup> to those the fulfilment of which depends entirely upon the forces under his command. If he grants conditions against his instructions, or conditions the fulfilment of which depends upon forces other than his own, and upon superior officers, his superior officer may disown them.<sup>3</sup>

<sup>1</sup> See above, § 184, as to enemy merchantmen lying in a port after its occupation under a capitulation.

<sup>2</sup> See U.S. Naval War Code, Article 51.

<sup>3</sup> See, *e.g.*, the capitulation in El Arish (Martens, *R.*, vii. p. 1) on

January 24, 1800, arranged between the French General Kléber and the Turkish Grand Vizier, and approved by the British Admiral Sir Sidney Smith. For details see previous edition, § 229. The Italian War Regulations of 1938 provide that

§ 230. That capitulations must be scrupulously adhered to is an old customary rule, since enacted by Article 35 of the Hague Regulations. Any act contrary to a capitulation would constitute an international delinquency if ordered by a belligerent Government, and a war crime if committed without such order. Such violation may be met by reprisals or punishment of the offenders as war criminals.

When there is no capitulation, but a simple surrender, it is a duty of the surrendering force to stop firing as soon as the white flag has been hoisted and the enemy is approaching to take possession. Those members of the surrendering force who continue to fire lose their claim to receive quarter,<sup>1</sup> and may therefore be killed on the spot. Or, if taken prisoners, they may be punished as war criminals.

## VI

### ARMISTICES

Grotius, iii. c. 21, §§ 1-13, c. 22, § 8—Pufendorf, viii. c. 7, §§ 3-12—Vattel, iii. §§ 233-260—Hall, § 192—Lawrence, § 216—Westlake, ii. p. 92—Philimore, iii. §§ 116-121—Halleck, ii. pp. 346-354—Hershey, No. 386—Moore, vii. § 1162—Taylor, §§ 513 and 516—Wheaton, §§ 400-404—Bluntschli, §§ 688-696—Heffter, § 142—Lueder in *Holtzendorff*, iv. pp. 531-544—Ullmann, § 186—Fauchille, §§ 1248-1258, 1395 (69)-1395 (71)—Despagnet, Nos. 563-566—Pradier-Fodéré, vii. Nos. 2889-2916—Rivier, ii. pp. 362-368—Nys, iii. pp. 491-494—Calvo, iv. §§ 2433-2449—Fiore, iii. Nos. 1484-1494, and *Code*, Nos. 1773-1786—Martens, ii. § 127—Longuet, §§ 145-149—Mérignhac, iii<sup>c</sup>. pp. 373-384—Hyde, ii. §§ 645-647—Suarez, §§ 384, 384 *bis*—Rolin, §§ 417-431—Colombos, §§ 158-161—Pillet, pp. 364-370—Zorn, pp. 201-206—Bordwell, pp. 294-296—Meurer, ii. §§ 43-44—Spaight, *Land*, pp. 232-248—Spaight, *Air*, pp. 349-358—Genet, §§ 222-224—*Kriegsbrauch*, pp. 41-44—Holland, *War*, Nos. 93-99, and *Lectures*, pp. 371-374—*Land Warfare*, §§ 256-300—Clunet in 46 *Clunet* (1919), pp. 72-74, 172-179—Sibert in *R.G.*, xl. (1933) pp. 657-714.

§ 231. Armistices or truces, in the wider sense of the term, are all agreements between belligerent forces for a temporary cessation of hostilities. They are in no wise to be compared with peace, and ought not to be called tem-

agreements which substantially alter the relative position of the belligerents or which lay down the principles of the treaty of peace can be

entered into only subject to the consent of the King (Article 74 (2)).

<sup>1</sup> See above, § 109.

porary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and neutrals, on all points beyond the mere cessation of hostilities.<sup>1</sup> In spite of such cessation the right of visit and search over neutral merchantmen therefore remains intact, as does likewise the right to capture neutral vessels attempting to break a blockade, and the right to seize contraband of war. Although all armistices are essentially alike in so far as they consist of cessations of hostilities, three different kinds must be distinguished—namely, (1) suspensions of arms, (2) general armistices, and (3) partial armistices.<sup>2</sup> The Hague Regulations deal with armistices in Articles 36 to 41, but very incompletely, so that the gaps must be filled from old customary rules.

✓ Suspensions of Arms.

§ 232. Suspensions of arms, in contradistinction to armistices in the narrower sense of the term, are cessations of hostilities agreed upon between military or naval forces, large or small, for a very short time, and regarding momentary and local military purposes only. Such purposes may be—collection of the wounded; burial of the dead; negotiations regarding the surrender or evacuation of a defended place, or for an armistice in the narrower sense of the term; or to enable a commander to ask for and receive instructions ✓ from a superior authority,<sup>3</sup> and the like. Suspensions of

<sup>1</sup> *The Rannveig* [1920] P. 177; [1922] 1 A.C. 97; 3 B. and C.P.C. 740, 1013. Some discussion on the questions whether and, if so, how far an armistice modifies belligerent rights in respect of enemy property and the alien enemy's inability to sue in a British court will be found in *In re Ferdinand, ex-Tsar of Bulgaria* [1921] 1 Ch. 107; Farrer in *Law Quarterly Review*, xxxvii. (1921) pp. 218-241 and 337-362; Beckett in *Law Quarterly Review*, xxxix. (1923) pp. 89-97. See also Verzijl, §§ 133-138, and Sibert, *op. cit.*, pp. 702-704.

On November 11, 1918, the President of the United States issued a proclamation announcing the armistice and including a statement that 'the war thus comes to an end.' See, as bearing on this proclamation, *United States v. Hicks*, 256 Fed. 707; *Annual*

*Digest*, 1919-1922, Case No. 308.

<sup>2</sup> Although, as will be seen from the following sections, this distinction is absolutely necessary, it is not made by several publicists. Holland, *War*, No. 93, even says: 'There is no difference of meaning, according to British usage at least, between a "truce," and "armistice," and a "suspension of arms."' *Land Warfare*, § 256—see in particular note (a)—accepts the distinction as indispensable. And see Sibert, *op. cit.*, pp. 658-662.

<sup>3</sup> An instructive example of a suspension of arms for such purposes is furnished by the convention between the German forces besieging Belfort and the French forces holding this fortress during the Franco-German War, signed on February 13, 1871; see Martens, *N.R.G.*, xix. p. 646.

arms have nothing to do with political purposes, or with the war generally, since they are of momentary and local importance only.<sup>1</sup> They concern exclusively those forces, and that spot, which are the object of the suspension of arms. ✓ The Hague Regulations do not specially mention suspensions of arms, since Article 37 speaks of local armistices only, apparently including suspensions of arms among local armistices.

§ 233. A general armistice is a cessation of hostilities which, in contradistinction to suspensions of arms with their momentary and local military purposes, is agreed upon between belligerents for the whole of their forces, and the whole region of war.<sup>2</sup> General armistices<sup>3</sup> are always conventions of vital political importance affecting the whole of the war. They are as a rule, although not necessarily, concluded for a political purpose. It may be that negotiations of peace have ripened so far that the end of the war is in sight, and that, therefore, military operations appear superfluous; or that the forces of one or more of the belligerents are exhausted and need rest; or that the belligerents have to face domestic difficulties, the settlement of which is more pressing than the continuance of the war; or for any other political purpose.<sup>4</sup> Thus Article 2 of the general

General  
Armistices. ✓

<sup>1</sup> For an instance of similar action see the British suspension of air attacks upon German cities on Corpus Christi Day in May 1918 by request of the Vatican; there was no agreement between the British Government and Germany (see Spaight, *Air*, p. 354).

<sup>2</sup> However, for particular reasons small parts of the belligerent forces and small parts of the theatre of war may be specially excluded without detracting from the general character of the armistice, provided that the bulk of the forces, and the greater part of the region of war, are included. Thus, Article 1 of the general armistice at the end of the Franco-German War of January 28, 1871, specially excluded all military operations in the Départments du Doubs, du Jura, de la Côte d'Or, and likewise the siege of Belfort.

<sup>3</sup> In the practice of belligerents

the terms 'suspension of arms' and 'general armistice' are sometimes not sufficiently distinguished, but are interchangeable. Thus, for instance, the armistice between France and Germany mentioned in the preceding note is entitled 'Convention entre l'Allemagne et la France pour la Suspension des Hostilités . . .', whereas the different articles of the Convention always speak correctly of an armistice, and an annex to the Convention signed on January 29 is entitled 'Annexe à la Convention d'Armistice' (Martens, *N.R.G.*, xix. p. 634).

<sup>4</sup> Sometimes, where several States are together waging war against a common foe, some of them conclude a general armistice, and others decline. Thus in 1912, during the Balkan War, Bulgaria, Serbia, and Montenegro entered into an armistice with Turkey, but Greece refused to join.

armistice at the end of the Franco-German War, dated January 28, 1871,<sup>1</sup> expressly declared the purpose of the armistice to be to enable the French Government to convoke a Parliamentary Assembly which might determine whether the war was to be continued, or what conditions of peace should be accepted. On the other hand, each of the Central Powers asked for, and was granted, an armistice in the World War because it could no longer continue the struggle, and desired peace.<sup>2</sup>

Partial  
Armistices.

§ 234. Partial armistices are agreements for cessation of hostilities which are not concluded by belligerents for their whole forces and the whole region of war, yet do not, like suspensions of arms, merely serve momentary and local military purposes. Partial armistices are concluded by belligerents for a considerable part of their forces and front; they are always of political importance affecting the war in general; and they are very often, although they need not be, agreed upon for political purposes. Article 37 of the Hague Regulations apparently includes partial armistices together with suspensions of arms under the term 'local' armistices. A partial armistice may be concluded

<sup>1</sup> Martens, *N.R.G.*, xix. p. 626.

<sup>2</sup> Under pressure of military disaster, Bulgaria sought a general armistice (*A.J.*, xiii. (1919), Suppl., p. 402), which was granted on September 29, 1918. Early in October, Austria-Hungary made overtures (*ibid.*, p. 77) to the United States for an armistice, which was eventually concluded on November 3, 1918, between representatives of the Austro-Hungarian Supreme Command and representatives of the Italian Supreme Command acting on behalf of the Allied and Associated Powers (*ibid.*, p. 80). A general armistice with Turkey had already been signed on October 30, 1918. On October 3-6, 1918, the German Government had requested the President of the United States to take steps for the restoration of peace, and 'in order to avoid further bloodshed' it had requested him 'to bring about the immediate conclusion of a general armistice on land, on water,

and in the air' (*ibid.*, p. 85). After correspondence and assurances, the President informed Germany on October 23, 1918 (*ibid.*, p. 92), that he was taking up with the Associated Powers the question of an armistice, and on November 5 (*ibid.*, p. 95) he notified her that 'Marshal Foch has been authorised by the Government of the United States and the Allied Governments to receive properly accredited representatives of the German Government, and to communicate to them terms of an armistice.' A meeting took place, and a general armistice was concluded between Marshal Foch, commander-in-chief of the Allied armies, acting on behalf of the Allied and Associated Powers, in conjunction with Admiral Wemyss, of the one part, and the German delegation of the other part, on November 11, 1918 (*ibid.*, p. 97). *Parl. Papers, Misc. No. 25* (1918), Cmd. 9212. See Strupp in *Z.V.*, xi. (1918-1920) pp. 252-281.

for military or naval forces only ; for cessation of hostilities in the colonies only ; and the like. But it is always a condition that a considerable part of the forces and of the region of war must be included, and that the purpose is not only a momentary one.

§ 235. As regards the competence to conclude armistices,<sup>1</sup> a distinction is necessary between suspensions of arms and general and partial armistices. Competence to conclude Armistices.

(1) Since the character and purpose of a suspension of arms are military, local, and momentary only, every commander is supposed to be competent to make such an agreement, and no ratification by superior officers or other authorities is required. Even commanders of the smallest opposing detachments may arrange a suspension of arms.

(2) On the other hand, since general armistices are of vital political importance, only the belligerent Governments themselves or their commanders-in-chief are competent to conclude them, and ratification, whether specially stipulated or not, is usually<sup>2</sup> considered necessary. Should a commander-in-chief conclude a general armistice which would not find ratification, hostilities may at once be recommenced without breach of faith, it being a matter of common knowledge that a commander-in-chief is not authorised to agree upon exclusion of ratification unless he received special powers thereto.

(3) Partial armistices may be concluded by the commanders-in-chief of the respective forces, and ratification is not necessary, unless specially stipulated ; the commanders being responsible to their own Governments in case they agree upon a partial armistice without being specially authorised thereto.

§ 236. No legal rule exists regarding the form of armistices, which may therefore be concluded either orally or in writing. However, the importance of general and partial Form of Armistices.

<sup>1</sup> On armistices as brought about through the good offices, mediation, or intervention on the part of third States see Sibert, *op. cit.*, pp. 666-668.

<sup>2</sup> The general armistices which brought about a cessation of hostilities in the World War in 1918

were in no case submitted for ratification. As to ratification see Hyde, ii. § 646, who considers it necessary ; so also Fauchille, § 1249, unless the delegates have received *plein pouvoirs formels et spéciaux*. See Sibert, *op. cit.*, pp. 669-675.

armistices makes it advisable to conclude them by signing written documents containing all items which have been agreed upon. No instance is known of a general or partial armistice in modern times concluded otherwise than in writing. But suspensions of arms are often only orally concluded.

Contents  
of Armis-  
tices.

§ 237. That hostilities must cease is the obvious content of all kinds of armistices. Usually, although not at all necessarily, the parties embody special conditions<sup>1</sup> in the armistice agreement. If, and so far as, this has not been done, the legal consequences of an armistice are in some respects much controverted. Everybody agrees that belligerents during an armistice may, *outside the line where the forces face each other*, do everything and anything they like regarding defence and preparation of offence; for instance, they may manufacture and import munitions and guns, drill recruits, build fortresses, concentrate or withdraw troops. But no unanimity exists regarding such acts as must be left undone, or may be done, *within the very line where the belligerent forces face each other*. As the Hague

<sup>1</sup> Hyde, ii. § 647, draws attention to the unusual character of the armistices which brought the hostilities of the World War to an end, and, in particular, of that made between the Allied and Associated Powers with Germany which rendered it 'practically impossible for Germany to resume formidable operations against its enemies,' and also contained in outline some of the more important provisions of the ensuing Treaty of Peace. Fleischmann, in Liszt, § 69, ii., describes the provisions of the armistice of November 11, 1918, as 'nicht völkerrechtlicher Brauch, sondern Missbrauch': see also Hold-Ferneck in *Z.I.*, xxx. (1922-1923) pp. 110-117. The legal relation of the terms of an armistice to those of the ensuing treaty of peace, once signed, when they differ, is not clear; but it would seem that the latter entirely supersede the former, and that if the latter exceed or otherwise conflict with the former, there may be a political or moral question but there cannot be a legal

one: see Temperley, *History of the Peace Conference*, i. (1920) pp. 365-427; ii. (1920) pp. 245-419; a note on Pensions and Allowances under the Treaty of Versailles in *B.Y.*, 1923-1924, pp. 162-167; on the political aspect, Keynes, *Economic Consequences of the Peace* (1919), ch. v. The German Delegation, in their observations of May 29, 1919, upon the draft Treaty of Peace, contended in effect that there was in the pre-armistice negotiations a binding *pactum de contrahendo* which furnished the basis of peace and to which the Treaty of Peace ought to conform; see also Hold-Ferneck, *op. cit.*; and the same, *Lehrbuch des Völkerrechts*, ii. (1932) pp. 152-157; and Verdross, *Völkerrecht* (1937), pp. 15-19. And see Kunz, *Die Revision der Pariser Friedensverträge* (1932), pp. 152-157, for a full discussion of the subject. And see generally, on the tendency of modern armistices to assume the form and content of preliminaries of peace, Sibert, *op. cit.*, pp. 679-700.

Regulations do not mention the matter, the controversy still remains unsettled.<sup>1</sup> The principle *vigilantibus jura sunt scripta* applies to armistices as well as to all other legal transactions. It is for the parties to make such arrangements as really suit their needs and wants.<sup>2</sup> Thus, during the Franco-German War, an armistice for twenty-five days, proposed in November 1870, fell to the ground on the Germans refusing to permit the revictualling of Paris.<sup>3</sup> As to intercourse, Article 39 of the Hague Regulations provides that: 'It is for the contracting parties to settle in the terms of the armistice what communications may be held within the theatre of war with the population and with each other.'

For the purpose of preventing the outbreak of hostilities during an armistice, it is usual to agree upon so-called lines of demarcation<sup>4</sup>—that is, a small neutral zone between the forces facing each other which must not be entered by members of either force. But there are no lines of demarcation in default of special agreement.

§ 238. In case the contrary is not stipulated, an armistice commences the very moment the agreement upon it is complete. But often the parties expressly stipulate the time from which it shall begin. If the very hour is stipulated, there is no cause for controversy.

Commencement of Armistices.

When the forces included in an armistice are dispersed over a very large area, the parties have very often stipulated different dates of commencement for the different parts of the front, because it has not been possible to announce the armistice at once to all the forces affected. Thus, for instance, Article 1 of the general armistice at the end of the Franco-German War<sup>5</sup> stipulated that it should take effect at once for the forces in and around Paris, but that with regard to the other forces its commencement

<sup>1</sup> For the details of the controversy see § 237 of the previous edition.

<sup>2</sup> See *The Rannveig* [1920] P. at p. 185; 3 B. and C.P.C. at p. 748; decision affirmed [1922] 1 A.C. 97; 3 B. and C.P.C. 1013. And see Garner, *Prize Law*, No. 140.

<sup>3</sup> See Pradier-Fodéré, vii. No. 2908, where the question of revictualling

during an armistice is discussed at some length, and the opinions of many writers from Grotius to our own day are quoted.

<sup>4</sup> See Pradier-Fodéré, vii. No. 2901; and, as to aerial warfare, Spaight, *Air*, pp. 351-352.

<sup>5</sup> Martens, *N.R.G.*, xix. p. 626.



should be delayed three days. Article 38 of the Hague Regulations enacts that an armistice must be notified officially and in good time to the competent authorities and the troops, and that hostilities are suspended immediately after notification or at a fixed time, as the case may be.

It sometimes happens that hostilities are carried on after the commencement of an armistice by forces which did not know of its commencement. In such cases the *status quo* at the date of the commencement of armistice must be re-established so far as possible, prisoners made and enemy vessels seized being liberated, capitulations annulled, places occupied evacuated, and the like ; but the parties may, of course, stipulate the contrary.

Violation  
of Armis-  
tices.

§ 239. Any violation<sup>1</sup> of armistices is prohibited, and, if ordered by the Governments concerned, constitutes an international delinquency. In case an armistice is violated by members of the forces on their own account, the individuals concerned may be punished by the other party in case they fall into his hands. But apart from this no unanimity exists among the writers on International Law as to the rights of the injured party in case of violation by the other party ; many<sup>2</sup> assert that the injured may at once, without giving notice, reopen hostilities ; others<sup>3</sup> maintain that he may not, but has only a right to denounce the armistice.<sup>4</sup> The Hague Regulations endeavoured to settle the controversy, Article 40 enacting that any serious violation of an armistice by one of the parties gives the other the right to denounce it, and even, in case of urgency, to recommence hostilities at once. Three rules may be formulated from this—(1) violations which are not serious do not even give a right to denounce an armistice ; (2) serious

<sup>1</sup> Such as the scuttling of German vessels at Scapa Flow on June 21, 1919, by order of Admiral von Reuter.

<sup>2</sup> See, for instance, Grotius, iii. c. 21, § 11 ; Pufendorf, viii. c. 7, § 12 ; Vattel, iii. § 242 ; Phillimore, ii. § 121 ; Bluntschli, § 695 ; Fiore, iii. No. 1494.

<sup>3</sup> See, for instance, Calvo, iv. § 2436 ; Despagnet, No. 566 ; Pradier-Fodéré, vii. No. 2913.

<sup>4</sup> From a direct violation of an armistice there must be distinguished the case of a belligerent held (under a special treaty provision) responsible for the effect of an act done before the armistice, e.g. the explosion of a mine planted before the armistice : see *Eisenbach Brothers v. Germany* (United States and Germany : Mixed Claims Commission), *Annual Digest*, 1925-1926, Case No. 358.

violations empower the other party to denounce the armistice, but not, as a rule, to recommence hostilities at once without notice ; (3) only in case of urgency is a party justified in recommencing hostilities without notice. But since the terms 'serious violation' and 'urgency' lack precise definition, the course to be taken is in practice left to the discretion of the injured party.

§ 240. In case an armistice has been concluded for an indefinite period, the parties having made no stipulations regarding notice to recommence hostilities, notice may be given at any time, and hostilities recommenced at once after notification. In most cases, however, armistices are agreed upon for a definite period, and then they expire at the end of it without special notice, unless notification has been expressly stipulated. If, in case of an armistice for a definite period, the exact hour of the termination has not been agreed upon, but only the date, the armistice terminates at twelve o'clock midnight.

End of  
Armistices.

## CHAPTER VI

### MEANS OF SECURING LEGITIMATE WARFARE

#### I

##### ON MEANS IN GENERAL OF SECURING LEGITIMATE WARFARE

Fauchille, §§ 1014-1017—Spaight, *Land*, p. 461—*Land Warfare*, §§ 435-438—  
Holland, *Lectures*, pp. 377, 378—Garner, ii. §§ 578-595—Lawrence, § 209a.

Legiti-  
mate and  
Illegiti-  
mate  
Warfare.

§ 241. Since war is not a condition of anarchy and lawlessness, International Law requires that belligerents shall comply with its rules in carrying on their military and naval operations. So long, and in so far, as belligerents do this, their warfare is legitimate ; if they do not, their warfare is illegitimate. Acts and omissions contrary to International Law can be committed by belligerent Governments themselves, by commanders or members of the forces, or by individuals who do not belong to the forces. Belligerents bear a vicarious responsibility for internationally illegal acts of their soldiers, which turns into original responsibility if they refuse to repair the wrong done by punishing the offenders and, if necessary, compensating the sufferers.<sup>1</sup> Cases in which belligerent Governments themselves order or commit illegitimate acts, and also cases in which they refuse to punish their soldiers for illegitimate acts, constitute international delinquencies.<sup>2</sup>

How Le-  
gitimate  
Warfare  
is to a  
certain  
extent  
secured.

§ 242. Legitimate warfare is, at any rate to a certain extent, secured through several means recognised by International Law. These means fall into three classes. The first class comprises measures of self-help—reprisals ; punishment of war crimes committed by enemy soldiers and other enemy subjects ; the taking of hostages. The second

<sup>1</sup> See above, vol. i. §§ 149-150.

<sup>2</sup> See above, vol. i. § 151.

class comprises — complaints lodged with the enemy ; complaints lodged with neutral States ; good offices, mediation, and intervention on the part of neutral States. The third class comprises rights to compensation. Thus, according to Article 3 of Hague Convention IV., belligerents are responsible for all acts committed by members of their forces, and are liable to make compensation, if the case demands it, for any violation of the Hague Regulations.

## II

### COMPLAINTS, GOOD OFFICES AND MEDIATION, INTERVENTION

*Land Warfare*, §§ 439-440—Lawrence, § 209a.

§ 243. Commanders of forces engaged in hostilities frequently lodge complaints with each other regarding single acts of illegitimate warfare committed by members of their forces, such as abuses of the flag of truce, violations of the flag of truce, or of the Geneva Convention, and the like. The complaint is sent to the enemy under the protection of a flag of truce, and the interest which every commander takes in the legitimate behaviour of his troops should always make him attend to complaints and punish the offenders, provided that the complaints are found to be justified. Very often, however, it is impossible to verify the charges, and then charge and denial face each other without there being any way of solving the difficulty. It also often happens during war that the belligerent Governments lodge with each other mutual complaints of illegitimate acts and omissions. Since diplomatic intercourse is broken off during war, such complaints are sent to the enemy, either under the protection of a flag of truce, or through a neutral State which lends its good offices.

Com-  
plaints  
lodged  
with the  
Enemy.

§ 244. If certain grave illegitimate acts or omissions of warfare occur, belligerents frequently lodge complaints with neutral States, either asking their good offices, mediation, or intervention to make the enemy comply with the

Com-  
plaints  
lodged  
with  
Neutrals.

laws of war, or simply drawing their attention to the facts.<sup>1</sup> During the World War all the belligerents lodged innumerable complaints with the neutral Powers, accusing one another of countless violations of the laws of war and neutrality.

Good  
Offices  
and  
Media-  
tion.

§ 245. Complaints lodged with neutral States may instigate one or more of them to lend their good offices or mediation to the belligerents for the purpose of settling the conflict arising from charges and denials of illegitimate acts or omissions of warfare; and resort to reprisals may thus be prevented. Good offices and mediation so offered do not differ from those which settle a difference between States in time of peace<sup>2</sup>; they are friendly acts in contradistinction to intervention, which is dictatorial interference for the purpose of making the belligerents comply with the laws of war.

Interven-  
tion on the  
part of  
Neutrals.

§ 246. There can be no doubt that neutral States (whether a complaint has been lodged with them or not) may, either singly, or jointly and collectively, exercise intervention whenever illegitimate acts or omissions of warfare are committed (1) by belligerent Governments, or (2) by members of belligerent forces, if the Governments concerned do not punish the offenders and compensate the sufferers. It has already been stated<sup>3</sup> that other States have a right to intervene, in case a State violates, in time of peace or war, those principles of the Law of Nations which are universally recognised. Such principles of International Law are endangered when a belligerent Government commits acts of illegitimate warfare or does not punish the offenders in case such acts are committed by members of its armed forces. But apart from this, the Hague Regulations make illegitimate acts of warfare on land now appear as by right

<sup>1</sup> Thus, at the beginning of the Franco-German War, France lodged a complaint with Great Britain, and asked her intervention on account of the intended creation of a volunteer fleet by Germany, which France considered to be a violation of the Declaration of Paris (see above, § 84). Conversely, in January 1871, Germany, in a circular addressed to her

diplomatic envoys abroad, to be communicated to the neutral Governments, complained of twenty-one cases in which the French forces had, deliberately and intentionally, it was alleged, fired on bearers of a flag of truce.

<sup>2</sup> See above, §§ 7-11.

<sup>3</sup> Above, vol. i. § 135 (4).

the affair of all signatory States to the Convention; the neutral signatory States certainly have a right of intervention if acts of warfare are committed which are illegitimate according to the Hague Regulations. If any such intervention occurred, it would have nothing to do with the war in general, and would not make the intervening State a party to the war, but would concern only the international delinquency committed by the one belligerent through acts of illegitimate warfare.

But although neutral States have without doubt a *right* to intervene, they have no duty to do so.<sup>1</sup> While it may not be practicable at present to urge that an obligation of this nature should be made part of the law, the duty of formal and emphatic protest in cases of ascertained violations of the law of war by the belligerent may not improperly be regarded as a desirable innovation.<sup>2</sup> In the absence of any such duty the frequency with which the neutrals exercise their undoubted right to protest against the violations of the law of war is a not negligible test of international morality at any given period.<sup>3</sup>

<sup>1</sup> See Lord Grey, *Twenty-Five Years* (1925), ii. p. 143, who suggests, as one of the lessons of the World War, that the undertaking of obligations to observe rules of war should in the future be made dependent upon an undertaking on the part of neutrals to uphold them by force, if necessary, against a belligerent guilty of their breach. And see for comment thereon Higgins in *B.Y.*, 1927, pp. 144, 145. See also Root in *A.S. Proceedings*, 1915, pp. 9, 10. See also below, § 319.

<sup>2</sup> In the course of the various wars which have taken place since the establishment of the League of Nations, appeals have been made and protests lodged with it on account of alleged violations of rules of warfare. As to the war between Bolivia and Paraguay see *Off. J.*, 1934, pp. 798, 1580; as to the Italo-Abyssinian War of 1935-1936 see *Off. J.*, 1936, April, May, and June; as to the Spanish Civil War of 1936-1939 see Resolution

of the Council of May 29, 1937: *Off. J.*, 1937, p. 334. In September 1938 the Assembly took note of the request of the Chinese Government for the dispatch of an international committee to examine cases of bombing from the air of civilian populations in China. In May 1939 the Council adopted a resolution inviting the Governments of the States represented on the Council and on the Far Eastern Committee having official representatives in China to obtain information on the matter and to furnish it to the Council. See *Off. J.*, 1939, p. 277.

<sup>3</sup> In a Declaration, made in Panama on October 3, 1939, on the Maintenance of International Activities in accordance with Christian Morality, the twenty-one American Republics undertook 'to protest against any warlike act which does not conform to International Law and to dictates of justice': *International Conciliation*, January 1940, No. 356, p. 25.

## III

## REPRISALS

Vattel, iii. § 142—Hall, § 135—Westlake, ii. pp. 123-126, and *Papers*, pp. 259-264—Taylor, §§ 487, 507—Wharton, iii. § 348b—Hershey, No. 337—Moore, vii. § 1114—Bluntschli, §§ 567, 580, 654, 685—Lueder in *Holtzendorff*, iv. p. 392—Pradier-Fodéré, viii. Nos. 3214-3221—Fauchille, §§ 1018-1026 (3)—Despagnet, No. 543—Rivier, ii. pp. 298-299—Calvo, iv. §§ 2041-2043—Martens, ii. § 121—Mérignhac, iii<sup>a</sup>. pp. 349-358—Hyde, ii. § 667—Suarez, §§ 369-370—Mérignhac-Lémonon, i. pp. 228-251—Lawrence, § 209a—Kunz, pp. 30-34—Holland, *War*, Nos. 110, 119-120, and *Lectures*, pp. 378-380—Baty, pp. 459-465—Bordwell, p. 305—Spaight, *Land*, pp. 462-465—Spaight, *Air*, pp. 39-47, 332-340—*Land Warfare*, §§ 452-460—Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 17-20—Le Fur, *Des représailles en temps de guerre* (1919)—Lafargue, *Les représailles en temps de guerre* 1919—Verdross, *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten* (1920), pp. 66-72—Halleck in *A.J.*, vi. (1912) pp. 107-118—Wilkinson in the *Law Magazine and Review*, xl. (1914-1915) pp. 289-298—Woolsey in the *Proceedings of the American Society of International Law*, ix. (1915) pp. 62-67—Renault in *42 Clunet* (1915), pp. 313-344—Mérignhac in *R.G.*, xxiv. (1917) pp. 9-26—Spirópoulos in *Z.I.*, xxix. (1921) pp. 189-205—Higgins in *B.Y.*, 1927, pp. 129-146—Strupp in *Z.V.*, xvi. (1932) pp. 572-582, and in *R.G.D.A.*, 5 (1936), pp. 3-19.

Reprisals  
between  
Belli-  
gerents in  
contradistinction to  
Reprisals  
in Time of  
Peace.

§ 247. Whereas reprisals in time of peace are injurious acts committed for the purpose of compelling a State to consent to a satisfactory settlement of a difference created through an international delinquency,<sup>1</sup> reprisals in time of war occur when one belligerent retaliates upon another, by means of otherwise illegitimate acts of warfare,<sup>2</sup> in order to compel him and his subjects and members of his forces to abandon illegitimate acts of warfare and to comply in future with the rules of legitimate warfare.<sup>3</sup> Reprisals between belligerents<sup>4</sup> cannot be dispensed with, for the effect of their use and of the fear of their being used cannot be denied.

<sup>1</sup> See above, §§ 33, 42.

<sup>2</sup> The confiscation on August 25, 1916, of the Palais de Venice in Rome, the seat of the Austrian Legation at the Holy See, and the property of Austria-Hungary, as a measure of reprisals against the bombardment of Venice by Austrian aircraft (see above, vol. i. § 390 (n.), and Scelle in *R.G.*, xxiv. (1917) pp. 244-255), would not seem to be in accordance with the definition of reprisals given

in the text, which presupposes the resort to such acts as would themselves otherwise be violations of the laws of war.

<sup>3</sup> On the loose use of the term 'reprisals' during the World War see Spaight, *Air*, pp. 40-47.

<sup>4</sup> The question how far reprisals are justified which, although directed against the enemy, hit neutrals, is discussed below, §§ 319, 319a, 360.

Every belligerent, and every member of his forces, knows for certain that reprisals are to be expected in case they violate the rules of legitimate warfare. But while reprisals are frequently an adequate means for making the enemy comply with these rules, they frequently miss their purpose, and call forth counter-reprisals on the part of the enemy. They have often been used as a convenient cloak for violations of International Law.<sup>1</sup>

§ 248. Whereas reprisals in time of peace are admissible for international delinquencies only, reprisals between belligerents are admissible<sup>2</sup> for any and every act of illegitimate warfare,<sup>3</sup> whether it constitutes an international delinquency or not. Thus, the Germans during the Franco-German War frequently, by way of reprisal, bombarded and fired undefended open villages where their soldiers had been treacherously killed by enemy individuals in ambush who did not belong to the armed forces. Again, Lord Roberts, during the South African War, ordered,<sup>4</sup> by way of reprisal, the destruction of houses and farms in the vicinity of a place

Reprisals  
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fare.

<sup>1</sup> Recourse to reprisals constituted a prominent feature of the World War. To mention only a few instances, the German army in Belgium committed appalling atrocities in the name of reprisals. The French bombarded from the air the undefended German towns of Stuttgart, Karlsruhe, and Trèves by way of reprisals because the Germans had so bombarded English and French undefended places. (See, however, Spaight, *Air*, p. 7 (n.)) Because Great Britain refused to carry out all the rules of the unratified Declaration of London, Germany declared all the waters around the British Isles a war area, and ordered her submarines to torpedo all British merchantmen without warning; in this way the *Lusitania* was sunk, and over 1100 innocent civilians were drowned. On the *Lusitania* case see above, § 194a (n.). To meet these reprisals, Great Britain resorted to counter-reprisals, and prohibited all imports to, and exports from, Germany; see below, § 319a. The course of events in the war which broke out with Germany in September 1939 was not dissimilar. The British Order in Council issued on November

27, 1939, was stated to be a reprisal against the German methods of mine-laying and submarine warfare was issued on November 27. See below, p. 655.

<sup>2</sup> It is for the injured belligerent to consider whether he will at once resort to reprisals, or, before doing so, will lodge complaints with the enemy or with neutral States. In practice, however, a belligerent will rarely resort at once to reprisals, if the violation of the rules of legitimate warfare is not very grave, and the safety of his troops does not require prompt and drastic measures.

<sup>3</sup> Prior to the Geneva Convention of 1929, it was generally agreed that prisoners of war may be made the objects of reprisals for acts of illegitimate warfare committed by the enemy: see Beinhauer, *Die Kriegsgefangenschaft* (1908), p. 74; Spaight, *Land*, pp. 89, 465; Luteroth, *Der Geisel im Rechtsleben* (1922), pp. 243-272. This is no longer the law. See above, § 126.

<sup>4</sup> See Section 4 of the Proclamation of June 19, 1900 (Martens, *N.R.G.*, 2nd ser., xxxii. p. 147), and Beak, *The Aftermath of War* (1906), p. 11.



where damage was done to the lines of communication. Or, again, the appalling atrocities committed in 1914 during the World War by the German soldiery in Belgium, Germany,<sup>1</sup> in so far as she did not deny them altogether, declared to have been necessary as measures of reprisal.<sup>2</sup>

Danger of  
Arbitrariness in  
Reprisals.

§ 249. The right to exercise reprisals carries with it great danger of arbitrariness, for often the alleged facts which make belligerents resort to them are not sufficiently verified; sometimes the rules of war which they consider the enemy to have violated are not generally recognised; often the act of reprisal performed is excessive compared with the precedent act of illegitimate warfare.<sup>3</sup> An extreme instance of such excessive action was the threat of Paraguay, during

<sup>1</sup> See the White Book published in 1915 by the German Foreign Office, *Die völkerrechtswidrige Führung des belgischen Volkskrieges*, and the Belgian Grey Book, *Réponse au livre blanc allemand du 10 mai 1915* (1916).

<sup>2</sup> See below, § 250.

<sup>3</sup> The following instances of reprisals may be mentioned:

(1) During the Franco-German War the French had captured forty German merchantmen, and made their captains and crews prisoners of war. Count Bismarck, who considered it against International Law to detain these men as prisoners, demanded their liberation, and when the French refused this, ordered forty French private individuals of local importance to be arrested by way of reprisal (not as hostages, see below, § 258), and sent as prisoners of war to Bremen, where they were kept until the end of the war. Count Bismarck was decidedly wrong (see above, § 201, and, to the contrary, Lueder in *Holtzendorff*, iv. p. 479, n. 6, and, as regards the present law, above, §§ 85, 201), since France had, as the law then stood, in no way committed an illegal act by detaining the German crews as prisoners of war.

(2) During the World War, when in 1915 the German Government ordered her submarines to torpedo British merchantmen at sight without warning, the British Admiralty declared that they would not in future regard the captured crews of

German submarines as 'honourable' prisoners of war, but would keep them separate from other German prisoners. Accordingly, thirty-nine captured officers and men were segregated by way of reprisal in naval detention barracks. Germany promptly resorted to counter-reprisals, and placed the same number of British officers in solitary confinement. Great Britain soon afterwards abandoned the policy of differential treatment (see Garner, ii. § 356).

(3) In September 1914, during the World War, the German armies in Belgium burned the university of Louvain, including its world-famed library, and other buildings in other towns, by way of reprisals, alleging that Belgian civilians had fired upon the German troops. The Belgian Government denied these charges, and maintained that German soldiers in Louvain had shot one another; the civilised world was horrified at these reprisals (see Garner, i. §§ 282-284, and the Belgian and German official publications mentioned above, § 248 (n.)).

See also Le Fur, *op. cit.*, *passim*; the case of Joseph Huddy and Captain Asgill in 1782 in Martens, *Causes célèbres*, iii. pp. 311-321, and Phillimore, iii. § 105; and the case of the Irishmen naturalised in the United States, captured by the British on American vessels, and sent to England in 1813 for trial for treason, in Wharton, iii. § 348; these two cases are given in the last edition of this work.

the war with Bolivia, to consider herself relieved of the duty to observe the rules of war as against Bolivia on account of the alleged violation of International Law by the latter.<sup>1</sup> This threat was subsequently abandoned.

§ 250. The Hague Regulations did not mention reprisals at all, because the Brussels Conference of 1874, which accepted the unratified Brussels Declaration, had struck out several sections of the Russian draft code regarding reprisals. These original sections<sup>2</sup> (69-71) stipulated—(1) that reprisals should be admitted only in extreme cases of absolutely certain violations of the rules of legitimate warfare; (2) that the acts performed by way of reprisal should not be excessive, but in proportion to the violation; (3) that reprisals should be ordered by commanders-in-chief only.

In face of the arbitrariness with which, according to the present state of International Law, resort can be had to reprisals, it cannot be denied that an agreement<sup>3</sup> upon some precise rules regarding them is an imperative necessity. The events of the World War illustrate the present condition of affairs. The atrocities committed by the German army in Belgium and France, if avowed at all, were always declared by the German Government to be justified as measures of reprisal. There is no doubt that Article 50 of the Hague Regulations, enacting that no general penalty, pecuniary or otherwise, may be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible, does not prevent the burning, by way of reprisals, of villages or even towns, for a treacherous attack committed there on enemy soldiers by unknown individuals, and, this being so, a brutal belligerent has his opportunity.<sup>4</sup> It should, therefore, be expressly enacted

<sup>1</sup> See *Off. J.*, 1934, p. 803.

<sup>2</sup> See Martens, *N.R.G.*, 2nd ser., iv. pp. 14, 139, 207. See also Articles 85 and 86 of the Manual of the Laws of War, adopted by the Institute of International Law (*Annuaire*, v. p. 174).

<sup>3</sup> During the World War some agreements were made between belligerents on the subject of reprisals; for instance, the agreement between Great Britain and Germany of July 2,

1917, which provided that reprisals upon prisoners of war should not take place until the expiry of four weeks after a demand for redress; see Kirchenheim in *Strupp, Wört.*, i. p. 748. A similar agreement was made between France and Germany on April 26, 1918.

<sup>4</sup> See above, § 170; Lawrence, § 180 (with note by Winfield); Holland, *War*, § 110; and Hyde, ii. § 692.

that reprisals, like ordinary penalties, may not be inflicted on the whole population for acts of individuals for which it cannot be regarded as collectively responsible.<sup>1</sup> The Convention of 1929 concerning the Treatment of Prisoners of War, in prohibiting altogether the use of reprisals against prisoners of war,<sup>2</sup> showed, in another sphere, the feasibility of conventional regulation of this matter. The potentialities of aerial warfare and the extreme vulnerability of non-combatants to its attacks tend to emphasise the urgency of agreements of this nature. In the absence of such agreements there remains the danger, clearly revealed during the World War, that reprisals instead of being a means of securing legitimate warfare may become an effective instrument of its wholesale and cynical violation in matters constituting the very basis of the law of war. ¶

#### IV

#### PUNISHMENT OF WAR CRIMES

Hall, § 135—Bluntschli, §§ 627-643a—Spaight, *Land*, p. 462—Holland, *War*, Nos. 117-118—Hershey, p. 411, n. 4—Ariga, §§ 96-99—Takahashi, pp. 166-184—*Land Warfare*, §§ 441-451—Renault, *De l'application du droit pénal aux faits de guerre* (1915)—Dumas, *Les sanctions pénales des crimes allemands* (1916)—Garner, ii. §§ 581-588—Lawrence, § 209a—Hyde, ii. §§ 919-920—Kunz, pp. 35-37—Verdross, *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten* (1920), and in *Strupp, Wört.*, i. pp. 775-777—Travers, *Le droit pénal international* (1920), §§ 22 (iii), 62 (ii)—Toynbee, *Survey, 1920-1923* (1925), pp. 96-99, and *Survey, 1924* (1926), pp. 400-403—Mullins, *The Leipzig Trials* (1921)—Landa in *R.I.*, x. (1878) pp. 182-184—Pic in *R.G.*, xxiii. (1916) pp. 243-288—Oppenheim in the *Law Quarterly Review*, xxxiii. (1917) pp. 266-286—Méginhae in *R.G.*, xxiv. (1917) pp. 28-56—Renault in *R.G.*, xxv. (1918) pp. 5-29—Bartlett in *Law Quarterly Review*, xxxv. (1919) pp. 177-192—Garner in *A.J.*, xiv. (1920) pp. 70-94—Colby in *Michigan Law Review* (1925), pp. 482-511 and 606-634.

<sup>1</sup> On the effect of reprisals upon neutrals in maritime warfare see below, § 319 and p. 542, notes 1 and 2.

<sup>2</sup> See above, § 126. Thus the

Italian War Regulations of 1938 provide that reprisals must not be resorted to in cases in which there is a specific rule of International Law prohibiting reprisals (Article 8).

§ 251. In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders.<sup>1</sup> It must, however, be emphasised that the term 'war crime' is used, not in the moral sense of the term 'crime,' but only in a technical legal sense, on account of the fact that perpetrators of these acts may be punished by the enemy. For, although among the acts called war crimes are many which are crimes in the moral sense of the term (such, for instance, as the abuse of the flag of truce or assassination of enemy soldiers), there are others which may be highly praiseworthy and patriotic (such as taking part in a levy *en masse* on territory occupied by the enemy). But because every belligerent may, and actually must, in the interest of his own safety, punish these acts, they are termed war crimes, whatever may be the motive, the purpose, and the moral character of the act.<sup>2</sup>

§ 252. In spite of the uniform designation of these acts as war crimes, four different kinds of war crimes must be distinguished on account of the essentially different character of the acts: namely, (1) violations of recognised rules regarding warfare committed by members of the armed forces, (2) all hostilities in arms committed by individuals who are not members of the enemy armed forces, (3) espionage and war treason, (4) all marauding acts.

✓ The following are examples of the more important violations of rules of warfare:

✓ (1) Making use of poisoned, or otherwise forbidden, arms

<sup>1</sup> This definition makes it clear that a belligerent may punish captured enemy soldiers who before capture committed violations of the rules of warfare which constituted—see below, § 253—war crimes. Strupp in *Z.I.*, xxv. (1915) p. 359, answers the question in the negative. See above, vol. i. § 445. On the question whether local territorial courts have by International Law jurisdiction to try enemy or ex-enemy persons for 'war crimes,' see Finch in *A.J.*,

xiv. (1920) pp. 218-223, and reports of prosecutions before French courts since the World War, e.g. the conviction and subsequent pardon of General von Nathusius; London *Times* newspaper, November 22 and 27, 1924, and Toynbee, *Survey*, 1924, pp. 401-403.

<sup>2</sup> See above, § 57. Particular objection is taken to the term 'war treason' as used below, § 255; but this term is generally recognised. See Spaight, *Land*, pp. 334-335.

and ammunition, including asphyxiating, poisonous, and similar gases.

- ✓ (2) Killing or wounding soldiers disabled by sickness or wounds, or who have laid down arms and surrendered.
- ✓ (3) Assassination, and hiring of assassins.
- ✓ (4) Treacherous request for quarter, or treacherous feigning of sickness and wounds.
- ✓ (5) Ill-treatment of prisoners of war, or of the wounded and sick. Appropriation of such of their money and valuables as are not public property.
- ✓ (6) Killing or attacking harmless private enemy individuals. Unjustified appropriation and destruction of their private property, and especially pillaging. Compelling the population of occupied territory to furnish information about the army of the other belligerent, or about his means of defence.
- ✓ (7) Disgraceful treatment of dead bodies on battlefields. Appropriation of such money and other valuables found upon dead bodies as are not public property or arms, ammunition, and the like.
- ✓ (8) Appropriation and destruction of property belonging to museums, hospitals, churches, schools, and the like.
- ✓ (9) Assault, siege, and bombardment of undefended open towns and other habitations. Unjustified bombardment of undefended places by naval forces. Aerial bombardment for the sake of terrorising or attacking the civilian population.
- ✓ (10) Unnecessary bombardment of historical monuments, and of such hospitals and buildings devoted to religion, art, science, and charity as are indicated by particular signs notified to the besiegers bombarding a defended town.
- ✓ (11) Violations of the Geneva Conventions.
- ✓ (12) Attack on, or sinking of, enemy vessels which have hauled down their flags as a sign of surrender. Attack on enemy merchantmen without previous request to submit to visit.
- ✓ (13) Attack or seizure of hospital ships, and all other

violations of the Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention.

- ✓(14) Unjustified destruction of enemy prizes.<sup>1</sup>
- ✓(15) Use of enemy uniforms and the like during battle ; use of the enemy flag during attack by a belligerent vessel.
- ✓(16) Attack on enemy individuals furnished with passports or safe-conducts ; violation of safeguards.
- ✓(17) Attack on bearers of flags of truce.
- ✓(18) Abuse of the protection granted to flags of truce.
- ✓(19) Violation of cartels, capitulations, and armistices.
- ✓(20) Breach of parole.<sup>2</sup>

§ 253. The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime ; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. A different

The Plea  
of  
Superior  
Orders.

<sup>1</sup> Unjustified destruction of neutral prizes (see below, § 431) is not a war crime, but is nevertheless an international delinquency, if ordered by the belligerent Government.

<sup>2</sup> By Article 228 of the Treaty of Peace with Germany 'the German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law'; and see also Articles 229, 230. See also Treaty of Peace with Austria, Article 173; with Bulgaria, Article 118; with Hungary, Article 157. Before these treaties were drawn up the Peace Conference at Paris appointed a commission, consisting of representatives of ten Allied and Associated Powers, to consider the responsibility of the authors of the war, the facts as to breaches of the laws and customs of war by the Central Powers, the degree of responsibility

for them attaching to particular individuals, and the constitution and procedure of a tribunal to try them. The commission presented a majority and two minority reports, and these important documents have been published by the Carnegie Endowment for International Peace (Division of International Law, Pamphlet No. 32); also printed in *A.J.*, xiv. (1920) pp. 95-154. See also Mérignhac in *R.I.*, 3rd ser., i. (1920) pp. 34-70. The provisions of the Peace Treaties for the surrender to the Allied Powers of persons accused by them of war crimes with a view to their trial proved abortive. The sequel was the trial of a few accused persons before the German Imperial Supreme Court at Leipzig in 1921: see Mullins, *op. cit.*; Mettgenberg in *Strupp, Wört.*, iii. pp. 44-47; Garner, *Developments*, pp. 455-463; Michelson, *Das Urteil im Leipziger U-boots Prozess ein Fehlspruch?* (1922); British Parliamentary Paper, Cmd. 1450; *A.J.*, xvi. (1922) pp. 628-640 and 674-723; *Annual Digest*, 1923-1924, cases referred to above in § 253, n. 1.

view has occasionally been adopted in military manuals<sup>1</sup> and by writers,<sup>2</sup> but it is difficult to regard it as expressing a sound legal principle. Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals.<sup>3</sup> Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime. Also, the political authorities of the belligerent will frequently incline to take into consideration the danger of reprisals against their own nationals which are likely to follow as a measure of retaliation for punishing a war crime *durante bello*. However, subject to these qualifications, the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of

<sup>1</sup> See, e.g., § 443 of the British Manual of the Laws and Usages of War on Land; § 366 of the United States Rules of Warfare. It will be noted that the British Military Manual enjoins obedience to lawful commands only. See Chapter III. Sections 10 and 11 of the *Manual*. See also, to the same effect, Stephen, *History of the Criminal Law of England*, i. (1883) pp. 205, 206, and Dicey, *The Law of the Constitution*, 9th ed. by Wade (1939), pp. 302-306. Neither can the rule in the United States manual be squared with the corresponding rule in American constitutional and criminal law. During the World War French courts consistently disregarded the plea of superior orders advanced by German prisoners of war.

<sup>2</sup> See, e.g., § 253 of the previous editions of this volume; Dumas,

*Les sanctions pénales des crimes allemands* (1916), pp. 29-34; Renault in 42 *Clunet* (1915), pp. 341-342. However, the great majority of writers is in favour of the view advanced in the text. See, for instance, Bellot in *Grotius Society*, ii. (1917) pp. 31-55; Mérignhac in *R.G.*, xxii. (1917) pp. 51-53; Pollock in *Law Quarterly Review*, xxxv. (1919), pp. 195-198; Finch in *A.J.*, xv. (1921) pp. 440-445; Spaight, *Air*, p. 47; Pearce Higgins in *Law Quarterly Review*, xxxviii. (1922), pp. 104-105; Poljakan, *La responsabilité pour les crimes et délits de guerre* (1923), pp. 147-165; Kunz, p. 37. See also Garner, ii. § 588 and the literature cited in *A.J.*, xvii. (1923) p. 115.

<sup>3</sup> See, e.g., *The Dover Castle*, decided in 1921 by the German Supreme Court: *Annual Digest*, 1923-1924, Case No. 231; [1921] *Cmd.* 1422, p. 42.

humanity.<sup>1</sup> To limit liability to the person responsible for the order may frequently amount, in practice, to concentrating responsibility on the head of the State whose accountability, from the point of view of both international and constitutional law, is controversial.<sup>2</sup>

§ 254. Since International Law is a law between States only and exclusively, no rules of International Law can exist to prohibit private individuals from taking up arms, and committing hostilities against the enemy. But private individuals committing such acts do not enjoy the privileges of members of armed forces, and the enemy has, according to a customary rule of International Law, the right to consider, and punish, such individuals as war criminals. Hostilities in arms committed by private individuals are war crimes, not because they really are violations of recognised rules regarding warfare, but because the enemy has the right to consider and punish them as acts of illegitimate warfare. The conflict between praiseworthy patriotism on the part of such individuals and the safety of the enemy

Hostilities in Arms by Private Individuals.

<sup>1</sup> The German Supreme Court held in *The Llandovery Castle* (*Annual Digest*, 1923-1924, Case No. 235; [1921] Cmd. p. 45), a case decided in the course of the so-called Leipzig Trials, that the defence of superior orders would afford no justification where the act was manifestly and indisputably contrary to International Laws as, for instance, in the case of killing of unarmed enemies or of shipwrecked persons who have taken refuge in lifeboats. Article 3 of the abortive Treaty of Washington, 1922, relating to submarine warfare, made a violator punishable as if for acts of piracy, whether or not such person is under orders of a governmental superior. As to the proposals for an International Criminal Court see below, p. 459, n. 1.

<sup>2</sup> Article 227 of the Treaty of Peace with Germany arraigned the German Emperor, not as being responsible for the war crimes committed by order by members of the German forces, but 'for a supreme offence against international morality and the sanctity of treaties.' However, the Dutch Govern-

ment refused to compel him to leave Holland, and the trial was not proceeded with. See Garner, ii. §§ 589-591; Report of Lapradelle and Larnaud submitted to the Peace Conference, printed in 46 *Clunet* (1919), pp. 131-159; Jellinek in *Deutsche Juristen Zeitung* (1919), pp. 42 ff., translated in 46 *Clunet* (1919), pp. 162-172; Simons, in 46 *Clunet* (1919), pp. 953-962; Mérignhac in *R.I.*, 3rd ser., i. (1920) pp. 35-70; Bellot, *The Detention of Napoleon Buonaparte* in *Law Quarterly Review*, xxxix. (1923) pp. 170-192; Kannen, *Ist Wilhelm II. strafbar? Die internationale Verantwortlichkeit der Staatsoberhäupter in Kriegsfällen* (1923); Mettgenberg in *Strupp, Wört.*, iii. pp. 42-44; Travers, *Le Droit pénal international* (1920), § 2145 (iii). During the detention of Napoleon Buonaparte at St. Helena the British law officers were asked a hypothetical question, whether the ex-Emperor could be convicted of manslaughter if he were to shoot a man negligently while at pistol practice: see Forsyth, *Hortensius the Advocate* (1879), p. 53 (n.).



troops does not allow of any solution. It would be unreasonable for International Law to impose upon a belligerent a duty to forbid the taking up of arms by his private subjects, because such action may occasionally be of the greatest value to him, especially for the purpose of freeing a country from the enemy who has militarily occupied it. Nevertheless, the safety of his troops compels the enemy to consider and punish such hostilities as acts of illegitimate warfare, and International Law gives him a right to do so.

It is usual to make a distinction between hostilities in arms by private individuals against an invading or retiring enemy, and hostilities in arms committed by the inhabitants against an enemy in occupation of territory. In the latter case one speaks of war rebellion, whether inhabitants take up arms singly or rise in a so-called levy *en masse*. Articles 1 and 2 of the Hague Regulations make the greatest possible concessions regarding hostilities committed by irregulars.<sup>1</sup> Beyond the limits of these concessions belligerents will never be able to go without the greatest danger to their troops.

It must be particularly noted that a merchantman of a belligerent, which attacks enemy vessels without previously having been attacked by them, may be considered and treated as a pirate,<sup>2</sup> and that the captain, officers, and members of the crew may, therefore, be punished as war criminals to the same extent as private individuals who commit hostilities in land warfare.<sup>3</sup>

Espionage  
and War  
Treason.

§ 255. Espionage and war treason, as has been explained above,<sup>4</sup> bear a twofold character. International Law gives a right to belligerents to use them. On the other hand, it gives a right to belligerents to consider them, when committed by enemy soldiers or enemy private individuals within their lines,<sup>5</sup> as acts of illegitimate warfare, and consequently

<sup>1</sup> See above, §§ 80-81.

<sup>2</sup> See above, §§ 85, 181, where reference is made to adverse criticism of this statement.

<sup>3</sup> As regards the execution of Captain Fryatt see above, § 181.

<sup>4</sup> See above, § 159.

<sup>5</sup> Espionage outside their lines—a notable feature of the World War—is punishable according to the Municipal Law of the State in which it takes place.

punishable as war crimes. Espionage has already been treated above.<sup>1</sup>

War treason consists of all such acts (except hostilities in arms on the part of the civilian population, spreading of seditious propaganda by aircraft,<sup>2</sup> and espionage) committed within the lines of a belligerent as are harmful to him and are intended to favour the enemy. War treason may be committed, not only in occupied enemy country, or in the zone of military operations, but anywhere within the lines of a belligerent.<sup>3</sup>

The following are the chief cases of war treason that may occur :

- ✓(1) Information of any kind given to the enemy.
- ✓(2) Voluntary supply of money, provisions, ammunition, horses, clothing, and the like, to the enemy.
- ✓(3) Any voluntary assistance to military operations of the enemy, be it by serving as guide in the country, by opening the door of a defended habitation, by repairing a destroyed bridge, or otherwise.
- ✓(4) Attempting to induce soldiers to desert, to surrender, to serve as spies, and the like ; negotiating desertion, surrender, and espionage offered by soldiers.
- ✓(5) Attempting to bribe soldiers or officials in the interest of the enemy, and negotiating such bribe.
- ✓(6) Liberation of enemy prisoners of war.<sup>4</sup>
- ✓(7) Conspiracy against the armed forces, or against individual officers and members of them.
- ✓(8) Wrecking of military trains, destruction of the lines of communication or of telegraphs or telephones in the interest of the enemy, and destruction of any war material for the same purpose.

<sup>1</sup> See above, §§ 159-161.

<sup>2</sup> See above, § 162a.

<sup>3</sup> See Oppenheim in the *Law Quarterly Review*, xxxiii. (1917) p. 286, and see above, § 251 (n.), with regard to the objection raised against this term.

<sup>4</sup> During the World War, Germany executed Miss Cavell, who was nursing in Brussels, on a charge of

having assisted Allied soldiers to escape. Even if, at the secret trial, the charge was proved, so that the sentence might perhaps have been justified according to the letter of the law, the execution was an outrage, especially as the victim was a person who had with equal devotion nursed German as well as French and English wounded. See Garner, ii. §§ 382-386.

(9) Intentional false guidance of troops by a hired guide, or by one who offered his services voluntarily.

(10) Rendering courier, or similar, services to the enemy.

Enemy soldiers—in contradistinction to private enemy individuals—may only be punished for war treason when they have committed the act of treason during their stay within a belligerent's lines under disguise. If, for instance, two soldiers in uniform are sent to the rear of the enemy to destroy a bridge, they may not, when caught, be punished for war treason, because their act was one of legitimate warfare. But if they exchange their uniforms for plain clothes, and thereby appear to be members of the peaceful private population, they may be punished for war treason.<sup>1</sup>

There are many acts of the inhabitants of occupied enemy country which a belligerent may forbid and punish, in the interests of order and the safety of his army, although they do not fall under the category of war treason, and are not therefore punishable as war crimes. To this class belong all acts which violate the orders legitimately given by an occupant of enemy territory.<sup>2</sup>

Maraud-  
ing.

§ 256. Marauders are individuals roving, either singly or collectively in bands, over battlefields, or following advancing or retreating forces, in quest of booty. They have nothing to do with warfare in the strict sense of the term; but they are an unavoidable accessory to warfare, and frequently consist of soldiers who have left their corps. Their acts are considered to be acts of illegitimate warfare, and they are punished in the interest of the safety of either belligerent.

<sup>1</sup> A remarkable case of this kind occurred in 1904, during the Russo-Japanese War. Two Japanese disguised in Chinese clothes were caught in an attempt to destroy, with the aid of dynamite, a railway bridge in Manchuria, in the rear of the Russian forces. Brought before a court-martial, they confessed themselves to be Shozo Jakoga, forty-three years of age, a major on the Japanese General Staff, and Teisuki Oki, thirty-one years of age, a captain on the Japanese General Staff. They were convicted, and condemned to be

hanged, but the mode of punishment was changed, and they were shot. All the newspapers which mentioned this case reported it as a case of espionage; but it was in fact one of war treason. Although the two officers were in disguise, their conviction for espionage was impossible according to Article 29 of the Hague Regulations; provided, of course, that they were court-martialled for no other act than the attempt to destroy a bridge.

<sup>2</sup> See *Land Warfare*, § 446.

§ 257. All war crimes may be punished<sup>1</sup> with death, but belligerents may, of course, inflict a more lenient punishment, or commute a sentence of death into a more lenient penalty. If this be done and imprisonment take the place of capital punishment, the question arises whether persons so imprisoned must be released at the end of the war, although their term of imprisonment has not yet expired. Some<sup>2</sup> answer this question in the affirmative, maintaining that it could never be lawful to inflict a penalty extending beyond the duration of the war. But it is believed that the question has to be answered in the negative. If a belligerent has a right to pronounce a sentence of capital punishment, it is obvious that he may select a more lenient penalty and carry it out even beyond the duration of the war. It would in no wise be in the interest of humanity to deny this right, for otherwise belligerents would be tempted always to pronounce and carry out a sentence of capital punishment in the interest of self-preservation.

Mode of  
Punish-  
ment of  
War  
Crimes.

## V

## TAKING OF HOSTAGES

Grotius, iii. c. 4, § 14, and c. 11, § 18—Hall, §§ 135, 156—Taylor, § 525—Bluntschli, § 600—Lueder in *Holtzendorff*, iv. pp. 475-477—Klüber, §§ 156, 247—G. F. Martens, ii. § 277—Ullmann, § 183—Fauchille, §§ 1146 (1), 1395 (61)—Pradier-Fodéré, vii. Nos. 2843-2848—Rivier, ii. p. 302—Calvo, iv. §§ 2158-2160—Fiore, iii. Nos. 1363-1364—Martens, ii. § 119—Hyde, ii. § 700—Kohler, § 80—Rolin, §§ 483-486—Liszt, § 59 (2) and 61, ii. (2)—Longuet, § 34—Bordwell, p. 305—Spaight, *Land*, pp. 465-470—Breton, *Les non-belligérants : leurs devoirs, leurs droits, et la question des otages* (1904)—Garner, i. §§ 195-201—*Kriegsbrauch*, pp. 49, 50—*Land Warfare*, §§ 461-464—Lutteroth, *Der Geisel im Rechtsleben* (1922), pp. 169-293.

<sup>1</sup> Upon the proposal to create an International Criminal Court see Woolsey in *A.S. Proceedings*, 1916, pp. 67-69; Bellot, *Report of the International Law Association* (1924), pp. 75-91; Fauchille, § 1236 (13); Lord Phillimore in *B.Y.*, 1922-1923, pp. 79-86; *Report of the International Law Association* (1926), pp. 106-225; Politis, *Les nouvelles tendances du droit international* (1927), pp. 95 et seq.; Pella, *La criminalité des États et le droit*

*pénal de l'avenir* (1926), and in *Revue internationale de droit pénal*, v. (1928) pp. 265-292; Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929), pp. 232-256; Brierly in *B.Y.*, 1927, pp. 80-88; Caloyanni in *Grotius Society*, xiv. (1929) pp. 69-85; Dumas in *R.I.*, 3rd ser., xiii. (1932) pp. 721-741.

<sup>2</sup> See, for instance, Hall, § 135.

Former  
Practice  
of taking  
Hostages.

§ 258. The practice of taking hostages, as a means of securing legitimate warfare, prevailed in former times much more than nowadays.<sup>1</sup> It was frequently resorted to in cases in which belligerent forces depended more or less upon each other's good faith, as, for instance, in the case of capitulations and armistices. To make sure that no perfidy was intended, officers or prominent private individuals were taken as hostages, and could be held responsible with their lives for any perfidy committed by the enemy. This practice has totally disappeared, and is hardly likely to be revived. But it must not be confused with the still existing practice of seizing enemy individuals for the purpose of making them the object of reprisals.<sup>2</sup>

Modern  
Practice  
of taking  
Hostages.

§ 259. A new practice of taking hostages was resorted to by the Germans in 1870 during the Franco-German War for the purpose of securing the safety of forces against possible hostile acts by private inhabitants of occupied enemy territory. Well-known men were seized and detained, in the expectation that the population would refrain from hostile acts out of regard for the fate of the hostages. Thus, when unknown people frequently wrecked the trains transporting troops, the Germans seized prominent enemy citizens, and put them on the engines, a device which always proved effective, and soon put a stop to further train-wrecking. The same practice was resorted to, although for a short time only, by Lord Roberts<sup>3</sup> in 1900 during the South African War. It has been condemned by the majority of writers. But it may be difficult to agree with their opinion. Matters would be different if hostages were seized, and exposed to dangers, for the purpose of preventing

<sup>1</sup> See, for an historical account from antiquity to modern times, Lutteroth, *op. cit.*, pp. 176-231.

<sup>2</sup> Thus, when in 1870, during the Franco-German War, Count Bismarck ordered forty French notables to be seized, and to be taken away into captivity, by way of retaliation upon the French for refusing to liberate the crews of forty captured merchantmen, these forty French notables were not taken as hostages, but were made the object of reprisals. (See above,

§ 249.) All the French writers who comment upon it make the mistake of referring to it as an instance of the taking of hostages.

<sup>3</sup> See Section 3 of the Proclamation of Lord Roberts, dated Pretoria, June 19, 1900, but this section was repealed by the Proclamation of July 29, 1900. See Martens, *N.E.G.*, 2nd ser., xxxii. pp. 147, 149. See Spaight, *Air*, pp. 333-334, on these 'prophylactic reprisals.'

legitimate hostilities on the part of members of the armed forces of the enemy.<sup>1</sup> But no one can deny that train-wrecking on occupied enemy territory by private enemy individuals is an act which a belligerent is justified in considering and punishing as war treason.<sup>2</sup> It is for the purpose of guarding against an act of illegitimate warfare that these hostages are put on the engines. The danger to which they are exposed comes from their fellow-citizens, who are informed that hostages are on the engines, and ought therefore to refrain from wrecking the trains. It cannot, and will not, be denied that the measure is a harsh one, and that it makes individuals liable to suffer for acts for which they are not responsible. But the safety of the troops and lines of communication of the occupying belligerent is at stake, and it seems doubtful, therefore, whether even the most humane commanders will always be able to dispense with this measure, since it alone has proved effective.<sup>3</sup>

During the World War, Germany adopted a terrible practice of taking hostages in the territories occupied by her armies, and shooting them when she believed that civilians had fired upon German troops.<sup>4</sup> The experience of the World War shows that the taking of hostages is a matter urgently demanding regulation; the Hague Regulations do not mention it.

<sup>1</sup> *Land Warfare*, § 463, does not consider the practice commendable; because innocent citizens are thereby exposed to legitimate acts of train-wrecking on the part of raiding parties of armed forces of the enemy. Spaight, *Land*, pp. 466-470, admits the practice in principle, but considers it to have been unjustified during the Franco-German as well as during the South African War, because there was no certainty that the train-wrecking had not been committed by raiding parties of the armed forces of the enemy.

<sup>2</sup> See above, § 255 (8).

<sup>3</sup> See above, § 248.

<sup>4</sup> Garner, i. §§ 195-201. The using

of prisoners, military and civil, as a screen for the protection of troops is entirely reprehensible: see Garner, i. §§ 202-205; Fauchille, § 1395 (62). It has now been prohibited, in regard to prisoners of war, by the Convention of 1929 (see above, § 126b). For the Turkish, German, and British practice in the World War of placing enemy prisoners in places exposed to air raids as a deterrent to their compatriots (called by Spaight 'prophylactic reprisals') see Spaight, *Air*, pp. 333-340. For German accusations against French and Russian forces of the indiscriminate taking of hostages in the World War see Kirckenheim in *Strupp, Wört.*, i. p. 372.

## VI

## COMPENSATION

Fauchille, § 1026 (3)—Despagnet, No. 510 *bis*—Lémonon, pp. 344-346—Higgins, pp. 260-261—Scott, *Conferences*, p. 528—Nippold, ii. § 24—Hatschek, pp. 370-372—Boidin, pp. 83-84—Spaight, *Land*, p. 462—Holland, *War*, No. 19—*Land Warfare*, § 436—Hofer, *Der Schadenersatz im Landkriegsrecht* (1913)—Schoen, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen* (1917), pp. 92-94 and 122-143—Garner, ii. § 580—Verdross, *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten* (1920)—Constantino, *I danni di guerra secondo il diritto internazionale* (1925)—Camuzel, *L'indemnité de guerre en droit international* (1927)—Held in *Strupp, Wört.*, i. pp. 724-743, iii. pp. 78-100—Fauchille in *R.G.*, xxiii. (1916) pp. 280-297—Pic, *ibid.*, pp. 243-268—Mérignhac in *R.G.*, xxiv. (1917) p. 8—Schuster in *B.Y.*, 1920-1921, pp. 167-189—Udina in *Rivista*, xviii. (1926) pp. 26-71.

How the Principle of Compensation for Violations of the Laws of War arose.

§ 259a. There is no doubt that, if a belligerent can be made to pay compensation for all damage done by him in violating the laws of war, this will be an indirect means of securing legitimate warfare. In former times no rule existed which stipulated such compensation, although, of course, violation of the laws of war was always an international delinquency. On the contrary, it was an established customary rule<sup>1</sup> that claims for reparation for damages caused by violations of the rules of legitimate warfare could not be raised after the conclusion of peace, unless the contrary was expressly stipulated.<sup>2</sup> It was not until the Second Hague Conference that matters underwent a change. In revising the Convention concerning the Laws and Customs of War on Land, besides other alterations, a new article (3) was adopted which enacts that 'A belligerent party which violates the provisions of the said (Hague) Regulations shall, if the case demands, be liable to make compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

Compensation for Violations of the Hague Regulations.

§ 259b. It is apparent that Article 3 of Convention IV. enacts two different rules: (1) that a belligerent who violates the Hague Regulations shall, if the case demand,

<sup>1</sup> See below, § 274.

<sup>2</sup> On the question of stipulations in treaties of peace for the payment of

indemnities and reparation for loss and damage inflicted by war see below, § 269a.

pay compensation ; (2) that a belligerent is responsible for all acts committed by any persons forming part of his armed forces.<sup>1</sup>

To take this second rule first, the responsibility of a State for internationally illegal acts on the part of members of its armed forces is, provided the acts have not been committed by its command or authorisation, only a vicarious responsibility, but nevertheless it must, as has been pointed out above,<sup>2</sup> pay damages for these acts when required. For this reason, Article 3 did not create a new rule in so far as it enacted that belligerents must pay for damage caused by members of their forces.

On the other hand, the rule that compensation must be paid by belligerents for damage done through violations of the Hague Regulations was a new rule, at any rate in so far as it is laid down in a general way. If interpreted according to the letter, Article 3 of Convention IV. provides for payment of compensation for violations of the Hague Regulations only, and not for violations of other rules of International Law concerning land warfare, or even concerning sea warfare. However, there is no reason to doubt that the principle of Article 3 must find application to any rule of the laws of war by the violation of which subjects of the enemy, or of neutral States, suffer damage. For instance, if the commander of a naval force, in contravention of Hague Convention IX., were to bombard an undefended place, compensation could be claimed for such subjects of the enemy and of neutral States as suffered damage through the bombardment.<sup>3</sup>

<sup>1</sup> As to compensation for neutral subjects see below, § 357.

<sup>2</sup> Vol. i. § 163.

<sup>3</sup> As to the indemnities and reparations in the treaties terminating the World War see below, § 269a. It has been held in a series of English cases that individuals cannot found claims on a treaty providing for reparations, although it may appear

that they were intended to derive benefits from it, unless it can be shown conclusively that the Crown or the other contracting State concluded the treaty as an agent or trustee for the individuals in question : *Civilian War Rights Association v. The King* [1932] A.C. 149 ; *Administrator of German Property v. Knoop* [1933] 1 Ch. 439.



# CHAPTER VII

## END OF WAR, AND POSTLIMINIUM

### I

#### ON TERMINATION OF WAR IN GENERAL

Hall, § 197—Lawrence, § 217—Phillimore, iii. § 510—Taylor, § 580—Moore, vii. § 1163—Heffter, § 176—Kirchenheim in *Holtzendorff*, iv. pp. 791-792—Ullmann, § 198—Fauchille, § 1692—Mérignhac, iii<sup>a</sup>. pp. 121-133—Despagnet, No. 605—Calvo, v. § 3115—Fiore, iii. No. 1693—Martens, ii. § 128—Longuet, § 155—Hyde, ii. § 921—Charleville, *La validité juridique des actes de l'occupant en pays occupé* (1902)—Focherini, *Il postliminio nel moderno diritto internazionale* (1908)—Phillipson, *Termination of War* (1916).

War a  
Temporary  
Con-  
dition.

§ 260. The normal condition between States being peace, war can never be more than a temporary condition ; whatever may have been the cause or causes of a war, it cannot possibly last for ever. For either the purpose of war will be realised, and one belligerent will be overpowered by the other, or both will sooner or later be so exhausted by their exertions that they will desist from the struggle.

Three  
Modes of  
Termina-  
tion of  
War.

§ 261. A war may be terminated in three different ways.<sup>1</sup>  
(1) Belligerents may abstain from further acts of war, and glide into peaceful relations without expressly making peace through a special treaty ; (2) they may formally establish the condition of peace through a special treaty of peace ; (3) a belligerent may end the war through subjugation of his adversary.

<sup>1</sup> Hyde, ii. § 905, adds a fourth, formal declaration by one party, and instances the Joint Resolution passed by Congress on May 15, 1920, terminating the war with Germany. This was followed by the Treaty of Berlin, signed on August 25, 1921 (see *A.J.*, xvi. (1922), Suppl., pp. 10-13). And see Hudson in *Harvard Law Review*,

xxxix. (1926) pp. 1029-1045. So also on September 3, 1919, the Parliament of China resolved that a state of peace between Germany and China had been restored, and this was followed by a treaty between Germany and China on May 20, 1921 (*L.N.T.S.*, 9, p. 272).

## II

## SIMPLE CESSATION OF HOSTILITIES

Hall, § 203—Phillimore, iii. § 511—Taylor, § 584—Bluntschli, § 700—Heffter, § 177—Kirchenheim in *Holtzendorff*, iv. p. 793—Ullmann, § 198—Fauchille, § 1693—Despagnet, No. 605—Nys, iii. p. 738—Rivier, ii. pp. 435-436—Calvo, v. § 3116—Fiore, iii. No. 1693—Martens, ii. § 128—Longuet, § 155—Mérignhac, iii<sup>e</sup>. p. 121—Pillet, p. 370—Hyde, ii. § 904—Suarez, § 519—Hatschek, pp. 363-364—Genet, § 221—Strupp in *Strupp*, *Wört.*, i. pp. 713-715—Liszt, § 69, i.—Phillipson, *Termination of War* (1916), pp. 3-8—Tansill in *Law Quarterly Review*, xxxviii. (1922) pp. 26-37—Beckett in *Law Quarterly Review*, xxxix. (1923) pp. 89-97—Fischer Williams, in *B.Y.*, 1926, pp. 24 *et seq.*

§ 262. The regular modes of termination of war are treaties of peace or subjugation; but cases have occurred in which simple cessation of all acts of war on the part of both belligerents has actually and informally brought the war to an end. Thus ended in 1716 the war between Sweden and Poland, in 1720 the war between Spain and France, in 1801 the war between Russia and Persia, in 1867 the war between France and Mexico, and in the same year the war between Spain and Chile.<sup>1</sup>

Exceptional Occurrence of Simple Cessation of Hostilities.

Although termination of war through simple cessation of hostilities is for many reasons inconvenient, and is, therefore, as a rule avoided, it may nevertheless in the future, as in the past, occasionally occur.

§ 263. Since, in the case of termination of war through simple cessation of hostilities, no treaty of peace embodies the conditions of peace between the former belligerents, the question arises whether the *status* which existed between the parties before the outbreak of war, the *status quo ante bellum*, should be revived, or the *status* which exists between the parties at the time when they simply ceased hostilities, the *status quo post bellum* (the *uti possidetis*), can be upheld. The majority of writers<sup>2</sup> correctly maintain that the *status*

Effect of Termination of War through Simple Cessation of Hostilities.

<sup>1</sup> For a discussion of these and other instances see Tansill, *op. cit.* Whereas the war between Prussia and several German States in 1866 came to an end through subjugation of some States and treaties of peace with others, Prussia

never concluded a treaty of peace with the Principality of Lichtenstein, which was also a party to the war.

<sup>2</sup> See, however, Phillimore, iii. § 511, who maintains that the *status quo ante bellum* has to be revived.

which exists at the time of cessation of hostilities becomes silently recognised through such cessation,<sup>1</sup> and is, therefore, the basis of the future relations of the parties. This question is of the greatest importance, regarding enemy territory militarily occupied by a belligerent at the time hostilities cease. According to the correct opinion, it can be annexed by the occupier, on the ground that his adversary, through the cessation of hostilities, has abandoned all rights he possessed over it.\* On the other hand, termination of war through cessation of hostilities does not dispose of claims of the parties which have not been settled by the actual position of affairs at the termination of hostilities, and it remains for the parties to settle them by special agreement, or to let them stand over.\*

### III

#### SUBJUGATION

Vattel, iii. §§ 199-203—Hall, §§ 204-205—Lawrence, § 77—Phillimore, iii. § 512—Halleck, ii. pp. 501-534—Taylor, §§ 220, 585-588—Moore, i. § 87—Walker, § 11—Wheaton, § 165—Bluntschli, §§ 287-289, 701-702—Heffter, 178—Kirchenheim in *Holtzendorff*, iv. p. 792—Liszt, §§ 17 and 69, i.—Ullmann, §§ 92, 97, 197—Fauchille, §§ 557 (10) and 1694—Despagnet, Nos. 387-390, 605—Rivier, ii. pp. 436-441—Nys, iii. p. 738—Calvo, v. §§ 3117-3118—Fiore, ii. No. 863, iii. No. 1693, and *Code*, Nos. 1083-1086—Martens, i. § 91, ii. § 128—Longuet, § 155—Pillet, p. 371—Suarez, § 520—Hyde, i. § 106 and ii. § 907—Holtzendorff, *Eroberungen und Eroberungsrecht* (1872)—Heimbürger, *Der Erwerb der Gebietshoheit* (1888), pp. 121-132—Westlake in the *Law Quarterly Review*, xvii. (1901) p. 392, now reprinted in Westlake, *Papers*, pp. 475-489—Phillipson, *Termination of War* (1916), pp. 8-51.

Subjugation in contradistinction to Conquest. § 264. Subjugation must not be confused with conquest, although there can be no subjugation without conquest. Conquest is taking possession of enemy territory by military force, and is completed as soon as the territory is effectively<sup>2</sup> occupied. Now, it is obvious that conquest of a part of enemy territory has nothing to do with subjugation, because the enemy may well reconquer it. Even the conquest of

<sup>1</sup> It follows that such a presumption can be rebutted by unequivocal and continuous protests of the defeated State.

<sup>2</sup> The conditions of effective occu-

pation have been discussed above in § 167. Regarding subjugation as a mode of acquisition of territory, see above, vol. i. §§ 236-241.

*the whole* enemy territory need not necessarily involve subjugation; for in a war between more than two belligerents the troops of one of them may evacuate their own country and join the allied army, so that the armed contention is continued, although the territory of one of the allies is completely conquered. Again, a belligerent, although he has annihilated the forces and conquered the whole of the territory of his adversary, and thereby brought the armed contention to an end,<sup>1</sup> may nevertheless not choose to exterminate the enemy State by annexing the conquered territory, but may conclude a treaty of peace with the expelled or imprisoned head of the defeated State, re-establish its Government and hand back to it the whole or a part of the conquered territory. Subjugation takes place only when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroys his existence by annexing the conquered territory. Subjugation may, therefore, be correctly defined as extermination in war of one belligerent by another through annexation<sup>2</sup> of the former's territory after conquest, the enemy forces having been annihilated.<sup>3</sup> }

§ 265. Although complete conquest, together with annihilation of the enemy forces, brings the armed contention, and thereby the war, actually to an end, the formal end of the war is thereby not yet realised, as everything depends upon the resolution of the victor regarding the fate of the vanquished State. ~~If~~ he be willing to re-establish the captive or expelled head of the vanquished State, it is a treaty of peace concluded with the latter which terminates the war. ~~But~~ if he desires to acquire the whole of the conquered territory for himself, he annexes it, and thereby formally ends the war through subjugation. That the expelled head and Government of the vanquished State

Subjugation a Formal End of War.

<sup>1</sup> The continuation of guerilla war after the termination of a real war is discussed above in § 60.

<sup>2</sup> That conquest alone is sufficient for the termination of civil wars has been pointed out above, § 261.

<sup>3</sup> Premature annexation can be-

come valid through the occupation becoming soon afterwards effective. Thus, although the annexation of the South African Republic, on September 1, 1900, was premature, it became valid through the occupation becoming effective in 1901. See above, § 167 (n.).

protest and keep up their claims, matters as little as do protests of neutral States. These protests may be of political importance for the future ; legally they are of no importance at all, unless they are made in pursuance of existing international instruments rendering illegal the war and the conquest on the part of the victorious State.<sup>1</sup>

History presents numerous instances of subjugation. Although no longer so frequent as in former times, subjugation is not at all of rare occurrence. Thus, modern Italy came into existence through the subjugation by Sardinia in 1859 of the Two Sicilies, the Grand Dukedom of Tuscany, the Dukedoms of Parma and Modena, and in 1870 the Papal States. Thus, further, Prussia subjugated in 1866 the Kingdom of Hanover, the Dukedom of Nassau, the Electorate of Hesse-Cassel, and the Free Town of Frankfort-on-the-Main ; Great Britain annexed in 1900 the Orange Free State and the South African Republic<sup>2</sup> ; and Italy annexed Abyssinia in 1936.<sup>3</sup>

#### IV

#### TREATY OF PEACE

Grotius, iii. c. 20—Vattel, iv. §§ 9-18—Phillimore, iii. §§ 513-517—Halleck, i. pp. 328-348—Taylor, §§ 590-592—Moore, vii. § 1163—Wheaton, §§ 538-543—Bluntschli, §§ 703-707—Heffter, § 179—Kirchenheim in *Holtzendorff*, iv. pp. 794-804—Ullmann, § 198—Fauchille, §§ 1696-1698—Hyde, ii. §§ 908, 909-920—Suarez, §§ 521-529—Despagnet, Nos. 606-611—Rivier, ii. pp. 443-453—Nys, iii. pp. 737-753—Calvo, v. §§ 3119-3136—Fiore, iii.

<sup>1</sup> See on the doctrine of non-recognition § 52*f* above.

<sup>2</sup> Since Great Britain annexed these territories in 1900, the agreement of 1902, regarding 'Terms of Surrender of the Boer Forces in the Field'—see *Parl. Papers, South Africa* (1902), Cmd. 1096—was not a treaty of peace, and the South African War came formally to an end through subjugation, although—see above, § 167 (n.)—the proclamation of the annexation was somewhat premature. The agreement embodying the terms of surrender of the routed remnants

of the Boer forces had, therefore, no internationally legal basis (see also below, § 274 (n.)). The case would be different if the British Government had really—as Sir Thomas Barclay asserted in the *Law Quarterly Review*, xxi. (1905) pp. 303, 307—recognised the existence of the Government of the South African Republic down to May 31, 1902.

<sup>3</sup> On the question whether the Italian proclamation of annexation of May 9, 1936, was premature see Strupp in *R.G.*, xlv. (1937) pp. 43-46 ; Rousseau, *ibid.*, xlv. (1938) pp. 53-77. See also above, p. 341, n. 1.

Nos. 1694-1700, and *Code*, Nos. 1954-1964—Martens, ii. § 128—Longuet, §§ 156-164—Mérignhac, iii<sup>e</sup>. pp. 121-123—Pillet, pp. 372-375—Liszt, § 69, ii.—Keith's *Wheaton*, pp. 1195-1211—Phillipson, *Termination of War* (1916), pp. 75-204.

§ 266. Although occasionally war ends through simple cessation of hostilities, and although subjugation is not at all rare or irregular, the most frequent end of war is a treaty of peace. Many writers correctly call a treaty of peace the normal mode of terminating war. Simple cessation of hostilities is certainly an irregular mode, while subjugation is, in most cases, either not within the scope of the intention of the victor or not realisable ; and it is quite reasonable that a treaty of peace should be the normal end of war. Treaty of Peace the most frequent End of War.  
 States which are driven from disagreement to war will, sooner or later, when the fortune of war has given its decision, be convinced that the armed contention ought to be terminated. Thus the normal mode of ending the contention is a mutual understanding and agreement upon certain terms ; and it is a treaty of peace which embodies such understanding. }

§ 267. However, as the outbreak of war interrupts all regular non-hostile intercourse between belligerents, negotiations for peace are often difficult of initiation. Each party, although willing to negotiate, may have strong reasons for not opening negotiations. Good offices and mediation on the part of neutrals, therefore, are often of great importance, as thereby negotiations are called into existence which otherwise might have been long delayed. But neither formal nor informal peace negotiations *ipso facto* bring hostilities to a standstill, although a partial or general armistice may be concluded for the purpose of such negotiations. Such negotiations can take place by the exchange of letters between the belligerent Governments, or through special negotiators, who may meet on neutral territory, or on the territory of one of the belligerents. In case they meet on belligerent territory, the enemy negotiators are inviolable, and must be treated on the same footing as bearers of flags of truce, if not as diplomatic envoys. For it can happen that a belligerent receives an enemy diplo- Peace Negotiations.

matic envoy for the purpose of peace negotiations.<sup>1</sup> Be that as it may, negotiations, wherever taking place and by whomsoever conducted, may always be broken off before an agreement is arrived at.

Pre-  
liminaries  
of Peace.

§ 268. Although ready to terminate the war through a treaty of peace, belligerents are frequently not able to settle all the terms at once. In such cases hostilities are usually brought to an end through so-called preliminaries of peace, the definitive treaty to take the place of the preliminaries being concluded later on. Such preliminaries are a treaty in themselves, embodying an agreement between the parties

<sup>1</sup> The World War (except as between Germany and China, and as between the United States and those of the Central Powers with which she was at war) ended as follows:—On October 3-6, 1918, the German Government forwarded to the President of the United States of America through the Swiss diplomatic channel a Note requesting him to take steps for a general armistice (see above, § 233) and for the restoration of peace, suggesting as a basis for peace negotiations the programme laid down by him in his Message to Congress of January 8, 1918 (which contained the 'fourteen points'), and in his subsequent pronouncements, particularly in his Address of September 27, 1918 (see *A.J.*, xiii. (1919), Suppl., p. 85). After an exchange of Notes the President informed Germany on November 5, 1918 (*ibid.*, p. 93), that he had been in communication with the Governments associated with the United States in the war, and that, subject to two qualifications as to reparation and the so-called 'freedom of the seas,' they were prepared to conclude peace on the suggested basis. A general armistice was signed on November 11 (see above, § 233), and a peace conference, at which all the victorious and none of the vanquished Powers were represented, assembled at Paris in January 1919 (see above, vol. i. § 50b). The draft treaty was handed to the German delegation, which had been summoned to Paris to receive it, in May 1919. Germany stated her objections in writing, and the treaty, after some modification, was signed on June 28,

1919. The Allied and Associated Powers accepted the German contention that there was a pre-armistice agreement upon the basis of peace (see note to § 237f, above), but there was controversy between them and Germany on the question whether the draft treaty accorded with that agreement. (For the observations of the German Delegation upon the Conditions of Peace see Pamphlet 143 of the American Association for International Conciliation, and, for the Reply of the Allied and Associated Powers and Covering Letter, see Treaty Series, No. 4 (1919).) See also Temperley, *History of the Peace Conference*, i. (1920) ch. ix.; ii. (1920) ch. vi. There was no pre-armistice agreement as to the basis of peace negotiations between the Allied and Associated Powers and any of Germany's allies. Armistices were granted to them (see above, § 233 (n.)), and eventually draft treaties were presented to each of them for their comment in writing and subsequent signature (see above, vol. i. § 50b, and see above, § 237 (n.)). The Treaty of Peace with Austria came into force on July 16, 1920; that with Bulgaria on August 9, 1920; and that with Hungary on July 26, 1921. The Treaty of Peace with Turkey, signed on August 10, 1920, and known as the Treaty of Sèvres, was not ratified and did not come into force. It was ultimately replaced by the Treaty of Lausanne, signed on July 24, 1923, which came into force, for the most part, on August 6, 1924.

regarding such terms of peace as are essential. Preliminaries are as binding as any other treaty, and therefore need ratification. Very often, but not necessarily, the definitive treaty of peace is concluded at a place other than that at which the preliminaries were settled.<sup>1</sup>

The purpose for which preliminaries of peace are agreed upon makes it obvious that such essential terms as are stipulated by them are the basis of the definitive treaty of peace. It may happen, however, that interested neutral States protest for the purpose of preventing this, and threaten intervention. Thus, when the war between Russia and Turkey had been ended through the Preliminaries of San Stefano of March 3, 1878, Great Britain protested on the ground that the terms were inconsistent with the Treaty of Paris of 1856; a congress met at Berlin, and Russia had to be content with less favourable terms of peace than those stipulated at San Stefano.<sup>2</sup>

§ 269. International Law does not contain any rules regarding the form of peace treaties; they may, therefore, be concluded verbally or in writing. But their importance makes the parties always conclude them in writing, and there is no instance of a treaty of peace verbally concluded.

§ 269a. Treaties of Peace often provide for the payment by the vanquished Power to the victor of a sum of money. The causes of such stipulations are various, and from the legal point of view immaterial. It may be a desire to enrich the victor, or to punish the vanquished, or to achieve both these ends; or it may be merely the recoupment of the victor for the expenses of the war. Such payments have usually in the past been described as 'indemnities,' and

Form and  
Parts of  
Peace  
Treaties.

Indem-  
nities and  
Repara-  
tion.

<sup>1</sup> Thus the war between Austria, France, and Sardinia was ended by the Preliminaries of Villafranca of July 11, 1859, yet the definitive treaty of peace was concluded at Zurich on November 10, 1859. The war between Austria and Prussia was ended by the Preliminaries of Nickolsburg of July 26, 1866, yet the definitive treaty of peace was concluded at Prague on August 23.

In the Franco-German War the Preliminaries of Versailles of February 26, 1871, were the precursor of the definitive treaty of peace concluded at Frankfort on May 10, 1871. See Sibert in *R.G.*, xl. (1933) pp. 692 *et seq.*, on the shadowy line of demarcation in modern practice between armistices, capitulations, and preliminaries of peace.

<sup>2</sup> See above, vol. i. § 135.



history affords many instances of them.<sup>1</sup> No indemnity in this sense was stipulated for at the end of the World War.<sup>2</sup> Part VIII. (Reparation) of the Treaty of Peace with Germany in 1919 provided for compensation for part of the loss and damage inflicted by her and her allies during the World War. By Article 231 she accepted the responsibility<sup>3</sup> for herself and her allies 'for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.'

And by Article 232 she undertook to 'make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany, by such aggression by land, by sea, and from the air, and in general all damage as defined in Annex 1' [of this Part of the Treaty].

An inter-Allied Commission known as the 'Reparation Commission' was established by the Treaty, for the purposes of determining the amount of compensation payable under these provisions and of supervising the payment.<sup>4</sup>

<sup>1</sup> For instance, at the en. of the Franco-Prussian War in 1871. See also Lord Phillimore, *Three Centuries of Treaties of Peace* (1917) (index); Fauchille, §§ 1705-1705 (5); and Engmann in *Z.I.*, xxx. (1922-1923) pp. 146-154.

<sup>2</sup> See, however, the provision in Article 232 of the Treaty of Peace with Germany for the reimbursement of Belgium for certain sums borrowed by her from the Allied and Associated Powers.

<sup>3</sup> On the question of Responsibility see above, § 62 (n.).

<sup>4</sup> See Temperley, *History of the Peace Conference*, ii. (1920) pp. 60-91, and particularly the summary on pp. 90, 91. See also above, § 237 (n.); Buell, *International Relations* (1925), ch. xxii.; and Held in *Strupp, Wört.*, i. pp. 724-743. For the subsequent history of the Reparation Problem see Toynbee, *Survey, 1920-1923*, pp. 113-203; *Survey, 1924*, pp. 266-399, which describe the course of events

up to the date of the entry into operation of the 'Dawes Plan'; and see his bibliography on p. 203 of the former volume; Held in *Strupp, Wört.*, iii. pp. 78-100 (with an extensive bibliography); Toynbee, *Survey, 1929*, pp. 111-166, 1930, pp. 495-528, and 1932, pp. 97-172; Bergmann, *The History of Reparations* (1927); McFadyean, *Reparations Reviewed* (1930); Wheeler-Bennett and Latimer, *The Reparation Settlement* (1930); Wheeler-Bennett, *The Wreck of Reparations* (1933). See also Schmid and Schmitz in *Z.d.V.*, i. (1929) pp. 251-320; Pépy in *R.I. (Paris)*, iv. (1929) pp. 490-576, and v. (1930) pp. 441-477; Finch in *A.J.*, xxiv. (1930) pp. 339-350; Fischer Williams in *B.Y.*, 1932, pp. 9-38; Liais in *R.G.*, xl. (1933) pp. 71-89. For the Reparation provisions of the other treaties see Temperley, *op. cit.*, v. (1921) pp. 1-16 (Austria and Hungary), and pp. 39-47 (Bulgaria). On the Reparation Commission in par-

§ 270. As the treaty-making power is, according to the Law of Nations, in the hands of the head <sup>1</sup> of the State, it is he who is competent to conclude peace. But just as constitutional restrictions imposed upon heads of States regarding their general power of concluding treaties <sup>2</sup> are of importance for International Law, so are constitutional restrictions imposed upon heads of States regarding their competence to make peace. Therefore, treaties of peace concluded by heads of States which violate constitutional restrictions are not binding upon the States concerned, because the heads have exceeded their powers. The constitutions of the several States settle the matter differently, and it is not at all necessary that the power of declaring war and that of making peace should be vested by them in the same hands. In Great Britain the power of the Crown to declare war and to make peace is indeed unrestricted. But the constitutions of other States provide otherwise.<sup>3</sup>

§ 271. Unless the treaty provides otherwise,<sup>4</sup> peace com- Date of  
Peace.

tioular see Held in *Strupp, Wört.*, iii. pp. 101-108; Fischer Williams in *Hague Recueil*, 1927 (i.), pp. 545-591; Trotabas in *R.I. (Paris)*, ii. (1928) pp. 166-215. The Hague Agreement of January 20, 1930, in adopting the 'Young Plan,' provided for the fixing of Germany's reparation debt at over £5,500,000,000, to be paid in sixty annual payments terminating in 1988: see Treaty Series, 1930, No. 4, Cmd. 3484 and (1931) No. 2, Cmd. 3763. The régime of reparations laid down in the Hague Agreement of 1930 was, in regard to Germany, declared as terminated by the Agreement of July 9, 1932, concluded at Lausanne: (1932) Cmd. 3484. In fact, the reparations ceased as from June 20, 1931, when the President of the United States proposed the postponement for one year of all payments on inter-Governmental debts, reparations, and relief debts, with the exception of Government obligations held by private parties. (For the text see *Documents*, 1931, p. 115.) This proposal was accepted by the interested States.

<sup>1</sup> See above, vol. i. § 495.

<sup>2</sup> See above, vol. i. § 497.

<sup>3</sup> See examples in Rivier, ii. p. 445, and above, § 93. The controverted question as to whether a head of a State who is a prisoner of war is competent to make peace ought to be answered in the negative. The reason is that the head of a constitutional State, although he does not by becoming a prisoner of war lose his position, nevertheless thereby loses the power of exercising the rights connected therewith. (See Vattel, iv. § 13.)

<sup>4</sup> The Treaties of Peace after the World War provided that peace should commence when they came into force, i.e. when a procès-verbal had been drawn up recording the deposit of ratifications by the vanquished Power and certain other Powers. See above, vol. i. § 568e. To reduce the many difficulties likely to arise in Municipal Law in fixing the date of the end of the World War, the British Parliament passed the Termination of the Present War (Definition) Act, 1918; see *Kotzias v. Tyser* [1920] 2 K.B. 69; *Ruffy-Arnell v. The King* [1922] 1 K.B. at pp. 611-612.

mences with the signing of the peace treaty.<sup>1</sup> An unratified peace treaty is considered as an armistice, and, should it not be ratified, hostilities may be recommenced. Sometimes, however, the peace treaty fixes a future date for the commencement of peace, stipulating that hostilities must cease on a certain future day.<sup>2</sup> This is the case when war is waged in several, or widely separated, parts of the world, so that it is impossible at once to inform the opposing forces of the conclusion of peace.<sup>3</sup> Different dates may even be stipulated for the termination of hostilities in different parts of the world.

## V

## EFFECTS OF TREATY OF PEACE

Grotius, iii. c. 20—Vattel, iv. §§ 19-23—Hall, §§ 198-202—Lawrence, § 218—Phillimore, iii. §§ 518-528—Halleck, i. pp. 334-348—Taylor, §§ 581-583

<sup>1</sup> The termination of the war between Germany and Russia, which began in 1914, presents peculiarities. An armistice was concluded on November 26, 1917, and the Treaty of Peace of Brest-Litovsk was signed on March 3, 1918, and ratifications were exchanged on March 29. On November 13, 1918, the Russian Government, by decree, denounced the treaty, and declared it null and void. By Articles 116 and 292 of the Treaty of Versailles Germany accepted the abrogation of this treaty. On April 16, 1922, a formal treaty of peace between Germany and Russia was concluded at Rapallo. When did the war end? With the cessation of hostilities, or with the ratification of the Treaty of Rapallo? See Nolde in *R.I.*, 3rd ser., iv. (1923) pp. 395-408, who accepts the latter date. But see the judgment of the Tribunal civil de la Seine in the case of *Société Peugeot contre Liasonoff et Kochtaria* of April 19, 1923, discussed by Nolde; and see incidentally the *Wimbledon*, Publications of the Permanent Court of International Justice, Series A, No. 1, where Germany was considered as a neutral in the war between Poland and Russia in 1921.

<sup>2</sup> The question has arisen whether, in a case where a peace treaty provides a future date for the termination of hostilities in distant parts, if the forces in those parts hear of the conclusion of peace before that date, they must abstain at once from further hostilities. Most writers correctly answer this question in the affirmative. But the French Prize Courts in 1801 condemned as good prize the English vessel *Swineherd* which was captured by the French privateer *Bellone* in the Indian Seas within the period of five months fixed by the Peace of Amiens for the termination of hostilities in those seas, but after the receipt by the commander of the *Bellone* of correct, though, as regards him, unofficial, information that peace had been concluded. For details see Hall, § 199; see also Phillimore, iii. § 521.

<sup>3</sup> The ending of the Russo-Japanese War was quite peculiar. Although the treaty of peace was signed on September 5, 1905, the agreement concerning an armistice pending ratification of the peace treaty was not signed until September 14, and hostilities went on till September 16.

—Wheaton, §§ 544-547—Bluntschli, §§ 708-723—Heffter, §§ 180-183, 184a—Kirchenheim in *Holtzendorff*, iv. pp. 804-817—Ullmann, § 199—Fauchille, §§ 1698-1702—Despagnet, No. 607—Rivier, ii. pp. 454-461—Nys, iii. pp. 747-757—Calvo, v. §§ 3137-3163—Fiore, iii. Nos. 1701-1703, and *Code Nos.* 1965-1985—Martens, ii. § 128—Longuet, §§ 156-164—Mérignhac, iii<sup>a</sup>. pp. 124-132—Pillet, pp. 375-377—Hatschek, pp. 367-370—Verdross in *Strupp, Wört.*, i. pp. 38-40—Hyde, ii. § 921—Phillipson, *Termination of War* (1916), pp. 214-277—Simon in *R.G.*, 2nd ser., i. (1919) pp. 245-261—Hurst in *B.Y.*, 1921-1922, pp. 37-47.

§ 272. The chief and general effect of a peace treaty is the restoration of a condition of peace between the former belligerents.<sup>1</sup> As soon as the treaty is ratified or otherwise comes into force, all rights and duties which exist in time of peace between the members of the Family of Nations are *ipso facto*, and at once, revived between the former belligerents. Restoration of Condition of Peace.

On the one hand, all acts legitimate in warfare cease to be legitimate. Neither capture of ships, nor occupation of territory, nor contributions nor requisitions, nor attacks on members of the armed forces or on fortresses, are any longer lawful. If forces, ignorant of the conclusion of peace, commit such hostile acts, the condition of things at the time peace was concluded must as far as possible be restored, and compensation must be paid.<sup>2</sup> Thus, ships captured must be released, territory occupied must be evacuated, members of armed forces taken prisoners must be liberated, contributions imposed and paid must be repaid.<sup>3</sup>

On the other hand, all peaceful intercourse between the former belligerents, and between their subjects, is resumed as before the war. Thus diplomatic intercourse is restored, and consular officers recommence their duties.<sup>4</sup>

§ 273. Unless the parties stipulate otherwise, the effect of a treaty of peace is that conditions remain as at the con- Principle of *Uti Possidetis*.

<sup>1</sup> On the effect of the Peace Treaties terminating the World War on the rights of neutral subjects see Sauser-Hall, *Les traités de paix et les droits privés des neutres* (1924).

<sup>2</sup> *The Mentor* (1799) 1 C. Rob. 179; *The John* (1818) 2 Dod. 336; Scott, *Cases*, 1102; for other cases see Pitt Cobbett, *Leading Cases*, ii. pp. 344-348; for the post-war depredations of the Confederate cruiser *Shenandoah*

see Westlake, i. p. 186; Hyde, i. § 232 (n.). Matters are, of course, different in case a future date—see above, § 271—is stipulated for the termination of hostilities.

<sup>3</sup> As to proceedings in prize against neutral vessels captured before the conclusion of peace see below, § 436.

<sup>4</sup> As to pre-war contracts and debts see above, § 101.

clusion of peace. Thus, all moveable State property, such as munitions, provisions, arms, money, horses, means of transport, and the like, seized by an invading belligerent, remain his property, as likewise do the fruits of immoveable property seized by him. Thus further, if nothing is stipulated regarding conquered territory, it remains in the hands of the possessor, who may annex it. But it is nowadays usual, although not at all legally necessary, for a conqueror desirous of retaining conquered territory to secure its cession in the treaty of peace.<sup>1</sup>

#### Amnesty.

§ 274. Since a treaty of peace is considered a final settlement of war, one of the effects of every peace treaty is the so-called amnesty—that is, an immunity for all wrongful acts done by the belligerents themselves, the members of their forces, and their subjects during the war, and due to political motives.<sup>2</sup> It is usual, but not at all necessary, to insert an amnesty clause in a treaty of peace. Therefore, unless the contrary is expressly stipulated in the treaty,<sup>3</sup>

<sup>1</sup> A case of concealed cession occurred with regard to Tripoli and Cyrenaica at the end of the Turco-Italian War in 1912. Inasmuch as Turkey did not want to cede these territories *expressis verbis*, and Italy insisted on acquiring them, the parties agreed in a protocol of October 15, 1912, that before the conclusion of peace, which took place at Lausanne on October 18, 1912—see Martens, *N.R.G.*, 3rd ser., vii. p. 7—Turkey should within three days grant complete autonomy to these territories, and thereby renounce sovereignty over them. This having been done, and peace concluded, Italy notified their annexation to the Powers. See Diena in *Z.I.*, xxiii. (1913), who, however, does not consider this to be a case of concealed cession, but of dereliction by Turkey and occupation of no man's land by Italy.

<sup>2</sup> See Simon in *R.G.*, 2nd ser., i. (1919) pp. 245-261. This immunity is only effective in regard to the other party to the war. For instance, while it prevents an occupant of enemy territory from punishing war criminals after the conclusion of peace, it does not prevent a belli-

gerent from punishing members of his own forces, or any of his own subjects, who during war committed violations of the laws of war, e.g. killed wounded enemy soldiers and the like.

Wrongful acts committed by the subjects of a belligerent against their own Government are not covered by it. Therefore a belligerent may after the conclusion of peace punish treason, desertion, and the like committed during the war by his own subjects, unless the contrary has been expressly stipulated in the treaty of peace. Thus Russia stipulated by Article 17 of the Preliminaries of San Stefano, in 1878—see Martens, *N.R.G.*, 2nd ser., iii. p. 252—that Turkey must accord an amnesty to such of her own subjects as had compromised themselves during the war. See also Article VI. of the Armistice Agreement of November 11, 1918 (confirmed by Article 212 of the Treaty of Versailles): Schröder in *R.I. (Geneva)*, ix. (1931) pp. 400-408; Wolgast in *Z.S.R.*, xv. (1935) pp. 545-571.

<sup>3</sup> The contrary was expressly stipulated in the Treaties of Peace after the World War. See above, § 253 (n.).

so-called war crimes<sup>1</sup> which were not punished before the conclusion of peace may no longer be punished after its conclusion. Individuals who have committed such war crimes, and have been arrested for them, must be liberated.<sup>2</sup> International delinquencies committed intentionally by belligerents through violation of the rules of legitimate warfare are considered to have been condoned. Formerly, even claims for reparation for damages caused by such acts could not be set up after the conclusion of peace, unless the contrary was expressly stipulated; but Article 3 of Hague Convention IV. has changed this.<sup>3</sup> On the other hand, the amnesty has nothing to do with ordinary crimes, or with debts incurred during war. A prisoner of war who commits murder during captivity may be tried and punished after the conclusion of peace, just as a prisoner who runs into debt during captivity may be sued after the conclusion of peace, or an action be brought on a ransom bill.<sup>4</sup>

§ 275. A very important effect of a treaty of peace is to end the captivity of prisoners of war.<sup>4</sup> This, however, does not mean that with the conclusion of peace all prisoners of war must at once be released. It only means—to use the words of Article 75 of the Geneva Convention of 1929<sup>5</sup>—that, ‘in any case, the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace,’ or—to employ the phraseology of the Treaty of Peace with Germany—that their repatriation ‘shall take place as soon as possible after the coming into force of the . . . treaty, and shall be carried out with the greatest rapidity.’<sup>6</sup> The instant release of prisoners at the very place where they were detained would be inconvenient, not only for the State

Release of  
Prisoners  
of War.

<sup>1</sup> See above, §§ 251-257. Clause 4 of the ‘Terms of Surrender of the Boer Forces in the Field’—see Parl. Papers, South Africa (1902), Cmd. 1096—expressly excluded from the amnesty ‘certain acts, contrary to usages of war, which have been notified by the Commander-in-Chief to the Boer Generals, and which shall be tried by court-martial immediately after the close of hostilities.’ But—see above, § 265 (n.)—the agreement embodying these terms of sur-

render was not a treaty of peace, the Boer War having been terminated through subjugation.

<sup>2</sup> This applies only to those who have not yet been convicted. Those undergoing a term of imprisonment need not be liberated at the conclusion of peace; see above, § 257.

<sup>3</sup> See above, § 259a.

<sup>4</sup> See above, § 132.

<sup>5</sup> See above, § 125.

<sup>6</sup> Article 214.

which kept them in captivity, but also for themselves, as in most cases they would not possess means to pay for their journey home. Therefore, although with the conclusion of peace they cease to be captives in the technical sense of the term, prisoners of war remain, as a body, under military discipline until they are brought to the frontier and handed over to their Government.<sup>1</sup> The Geneva Convention of 1929 provides that prisoners of war who are subject to criminal proceedings for an ordinary crime or offence may be detained until the end of the proceedings, and, if necessary, until the expiration of the sentence. The same applies also to prisoners convicted for such crimes and offences (Article 75). This probably means that prisoners who have been awarded disciplinary punishment must not be excluded from repatriation on the ground that they have not yet undergone the punishment wholly or in part.<sup>2</sup>

Revival of  
Treaties.

§ 276. The question how far a peace treaty revives treaties concluded between the parties before the outbreak of war is much controverted. Its solution depends upon the answer to the question of the effect of the outbreak of war upon existing treaties between belligerents, which has already been discussed.<sup>3</sup> In the absence of contrary provision in the treaty of peace, there can be no doubt that treaties which have been cancelled by the outbreak of war do not revive; on the other hand, there can likewise be no doubt that treaties which have only been suspended by the outbreak of war do revive. In practice it is usual for the parties to make special stipulations in the treaty of peace.<sup>4</sup>

<sup>1</sup> See *Prisoners of War (Brest Litovsk)*, Case, decided by the German Reichsgericht, *Annual Digest*, 1919-1922, Case No. 300.

<sup>2</sup> This is the solution adopted in Article 53 of the Convention, which deals with repatriation during hostilities, and in Article 219 of the Treaty of Versailles. After the Franco-German War in 1871, Germany detained such prisoners, whereas Japan after the Russo-Japanese War in 1905 released them. After the World War the Allied and Associated Powers released such German prisoners, unless the offence had been

committed after a certain date. See Pradier-Fodéré, vii. No. 2840; Bienhauer, *Die Kriegsgefangenschaft* (1908), p. 79; Payrat, *Le prisonnier de guerre* (1910), pp. 364-370; and see the Treaty of Peace with Germany, Article 218.

<sup>3</sup> See above, § 99, and the very detailed discussion of the question in Phillimore, iii. §§ 529-538. See also Keeley in *Grotius Society*, xii. (1927) pp. 7-17; Tobin, *Termination of Multipartite Treaties* (1933), pp. 126-193.

<sup>4</sup> See, for example, the Treaty of Peace with Germany, Articles 282-289.

## VI

## PERFORMANCE OF TREATY OF PEACE

Grotius, iii. c. 20—Vattel, iv. §§ 24-34—Phillimore, iii. § 597—Halleck, i. pp. 339-342, 347-348—Taylor, §§ 593-594—Wheaton, §§ 548-550—Bluntschli, §§ 724-726—Heffter, § 184—Kirchenheim in *Holtzendorff*, iv. pp. 817-822—Ullmann, § 199—Fauchille, §§ 1706-1709 (4)—Despagnet, Nos. 612 and 613—Rivier, ii. pp. 459-461—Nys, iii. p. 753—Calvo, v. §§ 3164-3168—Fiore, iii. Nos. 1704-1705—Martens, ii. § 128—Longuet, §§ 156-164—Mérignhac, iii<sup>a</sup>. pp. 132-133—Phillipson, *Termination of War* (1916), pp. 205-213.

§ 277. The general rule that treaties must be performed in good faith applies to peace treaties as well as to others. The great importance, however, of a treaty of peace, and its special circumstances and conditions, make it necessary to draw attention to some points connected with its performance. Occupied territory may have to be evacuated, a war indemnity may have to be paid in cash, boundary lines of ceded territory may have to be drawn, and many other tasks performed. These tasks often necessitate the conclusion of numerous treaties for the execution of the peace treaty in detail, and the appointment of commissioners. Difficulties may arise in regard to the interpretation<sup>1</sup> of certain stipulations, which will be settled by arbitration or otherwise if the parties cannot agree. Arrangements may have to be made for the case in which a part, or the whole, of the territory occupied during the war is to remain for some period under military occupation as a means of securing the performance of the peace treaty.<sup>2</sup>

Treaty of Peace, how to be carried out.

<sup>1</sup> See above, vol. i. §§ 553-554.

<sup>2</sup> As to means of securing the performance of treaties, including peace treaties, see above, vol. i. §§ 523-528. As to the occupation of the Rhineland by the Allies under the Treaty of Versailles see Ireton in *A.J.*, xvii. (1923) pp. 460-469; Giese in *Z.V.*, xii. (1922-1923) pp. 447-459; Huguet in *R.G.*, xxxi. (1924) pp. 554-593; Heyland, *Die Rechtsstellung der besetzten Rheinlande* (1923), and in *Strupp, Wört.*, iii. pp. 315-322; for the Rhineland Agreement of June 28, 1919, between the Allied Powers and Germany see *British Treaty Series*, No. 7 (1919), and *A.J.*, xiii. (1919), Suppl., pp. 404-

409. The Allied occupation of the Rhineland came to an end on June 30, 1930, when the last zone was evacuated by the French troops in pursuance of the agreements reached on August 29 and 30, 1929, at the Hague Reparation Conference. See the British White Paper, 'International Agreement on the Evacuation of the Rhineland Territory,' Cmd. 3417 (1929), and *Documents*, 1929, pp. 7-9. And see Toynbee, *Survey*, 1929, pp. 167-188. For the literature on questions arising out of the occupation of the Ruhr by France and certain of her Allies in 1923 see fifth edition of this work, vol. ii. p. 484, n. 2.



Breach of  
Treaty of  
Peace.

§ 278. Just as is the performance, so is the breach of peace treaties of great importance. A peace treaty can be violated in its entirety, or in one of its stipulations only. Violation by one of the parties does not *ipso facto* cancel the treaty; but the other party has the option to cancel it on this ground. Just as with violation of treaties in general, so with violations of treaties of peace, some writers maintain that a distinction must be drawn between essential and non-essential stipulations, and that only violation of essential stipulations creates a right for the other party to cancel the treaty of peace. It has been shown above<sup>1</sup> that the majority of writers rightly oppose the distinction.

But a distinction must be made between a violation during the period in which the conditions of the peace treaty have to be fulfilled, and a violation afterwards. In the first case, the other party may at once recommence hostilities, the war being considered not to have terminated through the violated peace treaty. The second case, which might happen soon, or not until several years after the period for the fulfilment of the peace conditions, is in no way different from violation of any treaty in general. If a party cancels a peace treaty, and wages war against the State which violated it, this war is a new war, and in no way a continuation of the previous war, which was terminated by the violated treaty of peace. Just as in case of violation of a treaty in general, so in case of violation of a peace treaty, the injured party who wants to cancel it on that ground must do this within reasonable time after the violation has taken place; otherwise the treaty, or at least the non-violated parts of it, remains valid. A mere protest neither constitutes a cancellation nor reserves the right of cancellation.<sup>2</sup>

## VII

### POSTLIMINIUM

Grotius, iii. c. 9—Bynkershoek, *Quaestiones Juris publici*, i. c. 15 and 16—Vattel, iii. §§ 204-222—Hall, § 162-166—Manning, pp. 190-195—Phillimore, iii. §§ 539-590—Halleck, ii. pp. 535-545—Taylor, § 595—Wheaton,

<sup>1</sup> See above, vol. i. § 547.

<sup>2</sup> See above, vol. i. § 547.

§ 398—Bluntschli, §§ 727-741—Heffter, §§ 188-192—Kirchenheim in *Holtendorff*, iv. pp. 822-836—Fauchille, § 1710—Despagnet, No. 614—Nys, iii. pp. 757-758—Rivier, ii. pp. 314-316—Calvo, v. §§ 3169-3226—Fiore, iii. Nos. 1706-1712—Martens, ii. § 128—Pillet, p. 377—Hyde, ii. § 922—Liszt, § 69, ii. (2)—Sertorio, *La prigionia di guerra e il diritto di postliminio* (1916).

§ 279. The term 'postliminium' is originally one of Roman Law, derived from *post* and *limen* (i.e. boundary). According to Roman Law, the relations of Rome with a foreign State depended upon whether or not a treaty of friendship<sup>1</sup> existed. If such a treaty was not in existence, Romans entering the foreign State concerned could be enslaved, and Roman goods taken there could be appropriated. Now, *jus postliminii* denoted the rule (1) that a Roman so enslaved, should he ever return into the territory of the Roman Empire, became *ipso facto* a Roman citizen again, with all the rights he possessed previous to his capture; (2) that Roman property, appropriated after entry into the territory of a foreign State, at once upon being taken back into the territory of the Roman Empire *ipso facto* reverted to its former Roman owner. Modern International Law and Municipal Law have adopted the term to indicate the fact that territory, individuals, and property, after having come in time of war under the authority of the enemy, return, either during the war or at its end, under the sway of their original sovereign. This can occur in different ways. Occupied territory can be evacuated voluntarily by the enemy, and then at once be reoccupied by the owner; or it can be reconquered by the legitimate sovereign; or it can be reconquered by a third party, and restored to its legitimate owner. Conquered territory can also be freed through a successful levy *en masse*. Property seized by the enemy can be retaken, but it can also be abandoned by the enemy, and subsequently revert to the belligerent from whom it was taken. Further, conquered territory can, in consequence of a treaty of peace, be restored to its legitimate sovereign. In all such cases, the question has to be answered what legal effects the postliminium has in regard to the territory, the individuals thereon, or the property concerned.

<sup>1</sup> See above, vol. i. § 40.

Post-liminium according to International Law, in contradistinction to Post-liminium according to Municipal Law.

§ 280. Most writers confound the effects of postliminium according to Municipal Law with those according to International Law. For instance: whether a private ship which is recaptured reverts *ipso facto* to its former owner<sup>1</sup>; whether the former laws of a reconquered State revive *ipso facto* by the reconquest; whether sentences passed on criminals during occupation by the enemy should be annulled; these, and many similar questions treated in books on International Law, have nothing at all to do with International Law, but have to be determined exclusively by the Municipal Law of the respective States. International Law can deal only with such effects of postliminium as are international. These may be grouped under the following heads: revival of the former condition of things, validity of legitimate acts, invalidity of illegitimate acts.

Revival of the former Condition of Things.

§ 281. Although a territory, and the individuals thereon, come through military occupation in war under the actual authority of the enemy, neither it nor they, according to the rules of International Law of our times, fall under the *sovereignty* of the invader.<sup>2</sup> They remain, if not acquired by the conqueror through subjugation, under the sovereignty of the other belligerent, although the latter is in fact prevented from exercising his supremacy over them. Now, the moment the invader voluntarily evacuates such territory, or is driven away by a levy *en masse*, or by troops of the other belligerent, or of his ally, the former condition of things *ipso facto* revives. The territory and individuals affected are at once, so far as International Law is concerned, considered to be again under the sway of their legitimate sovereign. For all events of international importance taking place on such territory the legitimate sovereign is again responsible towards third States, whereas during the time of occupation the occupant was responsible.

Validity of Legitimate Acts

§ 282. Postliminium has no effect upon such acts of a former military occupant connected with the occupied territory and with the individuals and property thereon, as he was, according to International Law, competent to perform; these acts are legitimate acts. Indeed, the State

<sup>1</sup> See above, § 196.

<sup>2</sup> See above, § 166.

into whose possession such territory has reverted must recognise these legitimate acts, and the former occupant has by International Law a right to demand this. Therefore, if the occupant has collected the ordinary taxes, has sold the ordinary fruits of immoveable property, has disposed of such moveable State property as he was competent to appropriate, or has performed other acts in conformity with the laws of war, this may not be ignored by the legitimate sovereign after he has again taken possession of the territory. However, this only extends to acts done by or under the authority of the occupant *during the occupation*.<sup>1</sup>

§ 283. If the occupant has performed acts which, according to International Law, he was not competent to perform, postliminium makes the invalidity of these illegitimate acts apparent. Therefore, if the occupant has sold immoveable State property, such property may afterwards be claimed from the purchaser, whoever he is, without compensation. If he has appointed individuals to offices for terms outlasting the occupation, they may afterwards be dismissed. If he has appropriated and sold such private or public property as may not legitimately be appropriated by a military occupant, it may afterwards be claimed from the purchaser without payment of compensation.<sup>2</sup>

Invalidity  
of Illegitimate  
Acts.

§ 284. Cases of postliminium occur only when a conquered territory reverts, either during or at the end of the war, into

No Post  
liminium  
after  
Inter-  
regnum.

<sup>1</sup> A case which illustrates this happened after the Franco-German War. In October 1870, during occupation by German troops of the *Départements de la Meuse and de la Meurthe*, a Berlin firm entered into a contract with the German Government to fell 15,000 oak trees in the State forests of these *départements*, paying in advance £2250. The Berlin firm sold its contractual rights to others, who, after having felled 9000 trees, sold, in March 1871, their right to fell the remaining 6000 trees to yet another party. The last-named party felled some of them during the German occupation; but when the French Government again took possession of the territory, the contractors were prevented from felling any more trees, and received no compensation

for their loss. The question whether the Germans had a right to enter into the contract at all is doubtful, on the ground that the extent of the felling involved seems to have gone beyond the ordinary course of forestry, and thus exceeded the powers of a usufructuary. (See above, § 134; Fauchille, § 137 (n.)) But even if they had, it covered the felling of trees during their occupation only, and not afterwards. (The protocol of signature added to the Additional Convention to the Peace Treaty of Frankfort, signed on December 11, 1871—see Martens, *N.R.G.*, xx. p. 868—comprised a declaration that the French Government did not recognise any liability to pay compensation.)

<sup>2</sup> See also above, § 137 (n.).

the possession of the legitimate sovereign. No case of postliminium arises when a territory, ceded to the enemy by the treaty of peace, or conquered and annexed without cession at the end of a war terminated through simple cessation of hostilities,<sup>1</sup> later on reverts to its former owner State; or when the whole of the territory of a State which was conquered and subjugated regains its liberty, and becomes again the territory of an independent State.<sup>2</sup> In these cases the territory has actually been under the sovereignty of the conqueror; the period between the conquest and the revival of the previous condition of things was not one of mere military occupation during war, but one of an interregnum during time of peace, and therefore the revival of the former condition of things is not a case of postliminium.<sup>3</sup>

<sup>1</sup> See above, § 263.

<sup>2</sup> Polish courts and writers have, in the period after the World War, applied the conception of *postliminium* in order to assert the continuity of present-day Poland with the pre-partition Polish State and to explain the nullity of at least some of the legislative and executive acts of Russia in respect of her Polish provinces. See *Kulakowski and Others v. Szumkowski* decided by the Supreme Court of Poland, *Annual*

*Digest*, 1927-1928, Case No. 375; and *Uszycka v. Polish Treasury*, *ibid.*, 1929-1930, Case No. 289. And see Ehrlich, *Prawo narodów* (2nd ed., 1932), pp. 300-304, and Hubert, *Przywrócenie władzy państwowej* (1936), and the same, *Rozbiory i odrodzenie Rzeczypospolitej* (1937) (in Polish).

<sup>3</sup> For an illustration see the case of the domains of the Electorate of Hesse-Cassel in Phillimore, iii. §§ 568-574.

**PART III**

**NEUTRALITY**



# CHAPTER I

## ON NEUTRALITY IN GENERAL

### I

#### DEVELOPMENT OF THE INSTITUTION OF NEUTRALITY

Hall, §§ 208-214—Lawrence, § 223—Westlake, ii. pp. 198-206—Phillimore, iii. §§ 161-226—Twiss, ii. §§ 208-212—Hershey, No. 446—Taylor, §§ 596-613—Walker, *History*, pp. 195-202, and *Science*, pp. 374-387—Geffcken in *Holtendorff*, iv. pp. 614-634—Ullmann, § 190—Fauchille, §§ 1441-1446 (10)—Despagnet, No. 687—Rivier, ii. pp. 370-375—Nys, iii. pp. 535-546—Calvo, iv. §§ 2494-2591—Fiore, iii. Nos. 1503-1535—Martens, ii. § 130—Dupuis, Nos. 302-307—Mérignhac, iii<sup>a</sup>. p. 495—Boeck, Nos. 8-152—Kleen, i. pp. 1-70—Hyde, ii. §§ 844-847—Rolin, §§ 922-930—De Louter, ii. pp. 387-403—Hatschek, pp. 322-325—Cruchaga, §§ 1163-1183—Suarez, §§ 493-499—Kunz, pp. 203-212—Genet, §§ 376-379, 393-397—Holdsworth, *History of English Law*, v. (1924) pp. 43-44, 47-49—Holland, *Lectures*, pp. 395-401—Keith's Wheaton, pp. 912-930, 1009-1025—Cauchy, *Le droit maritime international* (1862), ii. pp. 232-439—Gessner, pp. 1-69—Bergbohm, *Die bewaffnete Neutralität 1780-1783* (1884)—Fauchille, *La diplomatie française et la ligue des neutres 1780* (1893)—Schweizer, *Geschichte der schweizerischen Neutralität* (1895), i. pp. 10-72—Wehberg, § 2—Pyke, *The Law of Contraband* (1915), pp. 20-88—Wijnveld, *Neutraliteitsrecht te Land* (1917), pp. 1-14—Piggott and Ormond, *Documentary History of the Armed Neutralities* (1919)—Scott, *The Armed Neutralities of 1780 and 1800* (1919)—Butler and MacCoby, *The Development of International Law* (1928), pp. 229-247, 261-267—Jessup, *American Neutrality and International Police* (1928)—Haase, *Wandlung des Neutralitätsbegriffes* (1932)—Jessup and Deák, *Neutrality*, i. : *The Origins* (1935), pp. 3-49—Turlington, *Neutrality*, iii. : *The World War Period* (1936)—Jessup, *Neutrality*, iv. : *Today and Tomorrow* (1936)—Kulsrud, *Maritime Neutrality to 1780* (1936)—Bottié, *Essai sur la genèse et l'évolution de la notion de neutralité* (1937)—Horn, *Geschichtliche entwicklung des neuzeitlichen Neutralitätsbegriffs* (1938)—Sultan, *L'évolution du concept de la neutralité* (1938)—Cohn, *Neo-Neutrality* (1939)—Roxburgh in the *Journal of Comparative Legislation*, 3rd ser., i. (1919) pp. 17-24—G. G. Phillimore in *Grotius Society*, iv. (1919) pp. 43-70—Strisower in *Z.ö.R.*, v. (1926) pp. 184-204—Hammarškjöld in *Bibl. Visser.*, iii. pp. 55-141—Crichton in *B.Y.*, 1928, pp. 101-111—Warren in *Foreign Affairs (U.S.A.)*, xii. (1933-1934), pp. 371-394—Boye in *Hague Recueil*, 64 (1938) (ii.), pp. 161-218—Ténékides in *R.I.*, 3rd ser., xx. (1939) pp. 256-285.

For neutrality during the World War: Fauchille, §§ 1446 (7)-1446 (10)—



Mérignhac-Lémonon, ii. pp. 338-448—Bottié, *op. cit.*, pp. 283-306—Alvarez, *La grande guerre européenne et la neutralité du Chili* (1915)—Ariga, *La Chine et la grande guerre européenne* (1920)—Japikse, *Die Stellung Hollands im Weltkrieg* (1920)—Oyhanarte, *Argentiniens Neutralität* (1920)—Vanderbosch, *The Neutrality of the Netherlands during the World War* (1927)—Vigness, *The Neutrality of Norway during the World War* (1932)—Graham in *A.J.*, xvii. (1923) pp. 704-723 (general)—Mathieu in *A.J.*, xiv. (1920) pp. 319-342 (as to Chile)—De Carvalho in *B.Y.*, 1920-1921, pp. 125-137 (as to Brazil)—van Eysinga in *Z.V.*, xvi. (1932) pp. 603-632 (as to Holland)—As to the United States see below, p. 502. See also the list of works relating to neutrality in many particular wars given by Fauchille, § 1441 (n.), and the various volumes on the Economic and Social History of the World War, published by the Carnegie Endowment for International Peace. See also Deák and Jessup, *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries*, 2 vols. (1939) (with supplements bringing this valuable collection up to date).

Neutral-  
ity not  
practised  
in Ancient  
Times.

§ 285. Since in antiquity there was no notion of an International Law,<sup>1</sup> it is not to be expected that neutrality as a legal institution should have existed among the nations of old. Neutrality did not exist even in practice, for belligerents never recognised an attitude of impartiality on the part of other States. If war broke out between two nations, third parties had to choose between the belligerents, and become allies or enemies of one or the other. This does not mean that third parties had actually to take part in the fighting. Nothing of the kind was the case. But they had, if necessary, to render assistance: for example, to allow the passage of belligerent forces through their country, to supply provisions and the like to the party they favoured and to deny all such assistance to the enemy. Several instances are known of efforts<sup>2</sup> on the part of third parties to take up an attitude of impartiality; but belligerents never recognised such impartiality.

Neutral-  
ity during  
the  
Middle  
Ages.

§ 286. During the Middle Ages<sup>3</sup> matters only changed to the extent that, in the latter part of this period, belligerents did not exactly force third parties to a choice; legal duties and rights connected with neutrality did not exist. A State could maintain that it was no party to a war,

<sup>1</sup> See above, vol. i. § 37.

<sup>2</sup> See Geffcken in *Holtzendorff*, iv. pp. 614-615.

<sup>3</sup> See Bottié, *op. cit.* at p. 487, pp.

55-120. On the notion of neutrality in ancient Greece see Sfériades in *R.I.*, 3rd ser., xvi. (1935) pp. 641-663. See also Bottié, *op. cit.* at p. 487, pp. 20-54.

although it furnished one of the belligerents with money, troops, and other kinds of assistance. To prevent such assistance, which was in no way considered illegal, treaties were frequently concluded, during the latter part of the Middle Ages, specially stipulating that neither party was to assist the enemies of the other in any way during time of war, or allow his subjects to do so.<sup>1</sup> Through the influence of such treaties,<sup>2</sup> the difference between real and feigned impartiality of third States during war became recognised; and neutrality, as an institution of International Law, gradually developed during the sixteenth century.<sup>3</sup>

§ 287. At the time of Grotius, neutrality was recognised as an institution of International Law, although it was only in its infancy and needed a long time to reach its present range. Grotius did not know, or at any rate did not use, the term neutrality.<sup>4</sup> He treats neutrality in the very short seventeenth chapter of the Third Book on the Law of War and Peace, under the title *De his, qui in bello medii sunt*, and only establishes two doubtful rules.<sup>5</sup> The first is that neutrals shall do nothing which may strengthen a belligerent whose cause is unjust, or hinder the movements of a belligerent whose cause is just. The second rule is that, in a war in which it is doubtful whose cause is just, neutrals shall treat both belligerents alike, in permitting the passage of troops, in supplying provisions for the troops, and in not rendering assistance to persons besieged.

✓  
Neutral-  
ity during  
the Seven-  
teenth  
Century.

<sup>1</sup> The collection of rules and customs of maritime law which goes under the name of the *Consolato del Mare* made its appearance about the middle of the fourteenth century. One of its rules, i.e. that in time of war enemy goods on neutral vessels might be confiscated, but that, on the other hand, neutral goods on enemy vessels must be restored, became of great importance, since Great Britain acted accordingly from the beginning of the eighteenth century until the outbreak of the Crimean War in 1854. See above, § 176.

<sup>2</sup> For a lucid survey see Jessup and Deak, *Neutrality, i. Origins* (1935), pp. 20-49.

<sup>3</sup> See 'Neutrality and Neutralisa-

tion in the Sixteenth Century—Liège,' by W. S. M. Knight (*Journal of Comparative Legislation*, 3rd ser., ii. (1920) p. 98), and 'Neutrality of the Channel Islands during the Fifteenth, Sixteenth and Seventeenth Centuries,' by E. T. Nicolle, *ibid.*, p. 238.

<sup>4</sup> That the term was known at the time of Grotius may be inferred from the fact that Neumayr de Ramsa in 1620 published his work *Von der Neutralität und Assistenz in Kriegszeiten*; see Nys in *R.I.*, xvii. (1885) p. 78.

<sup>5</sup> § 3. See Holland, *Lectures*, p. 407, for examples showing the frequent use of the term 'neutrality' in the sixteenth century. See also Holdsworth, *History of English Law*, v. p. 48.

The treatment of neutrality by Grotius shows, on the one hand, that, apart from the recognition of the fact that third parties *could* remain neutral, not many rules regarding the duties of neutrals existed, and, on the other hand, that the granting of passage to troops of belligerents, and the supply of provisions to them, were not considered illegal. Indeed, the practice of the seventeenth century shows in numerous instances that neutrality was not really an attitude of impartiality, and that belligerents did not respect the territories of neutral States.<sup>1</sup>

Progress  
of Neu-  
trality  
during  
the Eigh-  
teenth  
Century.

§ 288. It was not until the eighteenth century that theory and practice agreed that it was the duty of neutrals to remain impartial, and of belligerents to respect the territories of neutrals. Bynkershoek and Vattel formulated adequate conceptions of neutrality. Bynkershoek<sup>2</sup> does not use the term 'neutrality,' but calls neutrals *non hostes*, and he describes them as those who are of neither party—*qui neutrarum partium sunt*—in a war, and who do not, in accordance with a treaty, give assistance to either party. Vattel,<sup>3</sup> on the other hand, uses the term 'neutrality,' and gives the following definition: 'Neutral nations, during a war, are those who take no one's part, remaining friends common to both parties, and not favouring the armies of one of them to the prejudice of the other.' But although Vattel's book appeared in 1758, twenty-one years after that of Bynkershoek, his doctrines are in some ways less advanced than those of Bynkershoek. Bynkershoek, in contradistinction to Grotius, maintained that in the absence of a previous treaty promising help,<sup>4</sup> neutrals had nothing to do with the question as to which party in a war had a just cause; that neutrals, being friends to both parties, have not to sit as judges between them, and consequently, must not give or deny to one party or the other more or less in accordance with their conviction as to the justice or injustice of the cause of each. Vattel, however, taught<sup>5</sup> that a neutral, although he may generally allow the passage of

<sup>1</sup> For some examples see Hall, § 209.

<sup>2</sup> *Quaestiones Juris publici*, i. c. 9.

<sup>3</sup> iii. § 103.

<sup>4</sup> In which case, he admitted,

there was room for the distinction between just and unjust wars: i. c. 9.

<sup>5</sup> iii. § 135.

troops of the belligerents through his territory, may refuse it to a belligerent making war for an unjust cause.<sup>1</sup>

Although the theory and practice of the eighteenth century agreed that it was the duty of neutrals to remain impartial, the impartiality demanded was not at all strict. For throughout the greater part of the century, a State was considered not to violate neutrality by furnishing one of the belligerents with such limited assistance as it had previously promised by treaty.<sup>2</sup> In this way troops could be supplied by a neutral to a belligerent, and passage through neutral territory could be granted to his forces. Secondly, either belligerent might use the resources of neutrals. It was not considered a breach of neutrality for a State to allow one or both of the belligerents to levy troops on its territory, or to grant letters of marque to its merchantmen. It is true that, during the second half of the eighteenth century, theory and practice became aware that neutrality was not consistent with these and other indulgences. But this only led to a distinction between neutrality in the strict sense of the term and imperfect neutrality. However, as regards the duty of belligerents to respect neutral territory, progress was made during this century. Whenever neutral territory was violated, reparation was asked for and made. Nevertheless, it was considered lawful for a victor to pursue a vanquished army into neutral territory, and for a fleet to pursue<sup>3</sup> a defeated enemy fleet into neutral territorial waters.

§ 289. Whereas, on the whole, the duty of neutrals to remain impartial, and the duty of belligerents to respect neutral territory, became generally recognised during the eighteenth century, the members of the Family of Nations did not come to an agreement during this period regarding the treatment of neutral vessels trading with belligerents. It is true that the right of visit and search for contraband of war, and the right to seize contraband, were generally recognised, but in other respects no general theory and practice were agreed upon. France and Spain upheld the

<sup>1</sup> On the former attempts to distinguish between just and unjust causes see above, § 61 (n.).

<sup>2</sup> See Nys in *R.I.*, 2nd ser., xv.

(1913) pp. 173-181, and the examples in Hall, § 211.

<sup>3</sup> See below, §§ 320, 347 (4).

rule that neutral goods on enemy ships, and also neutral ships carrying enemy goods, could be seized by belligerents. England, on the other hand, while conceding from time to time the rule 'free ship, free goods,' by particular treaties with certain States, throughout the eighteenth century generally followed the rule of the *Consolato del Mare*, according to which enemy goods on neutral vessels might be confiscated, whereas neutral goods on enemy vessels had to be restored.

England also upheld the principle that the commerce of neutrals should in time of war be restricted to the same limits as in time of peace, since most States in time of peace reserved *cabotage* and trade with their colonies for vessels of their own merchant marine. It was in 1756 that this principle first came into question. In that year, during war with England, France found that the naval superiority of England prevented her from carrying on her colonial trade by her own merchant marine, and therefore threw it open to vessels of the Netherlands which had remained neutral. England then ordered her fleet to seize all such vessels with their cargoes, on the ground that they had become incorporated with the French merchant marine, and had thereby acquired enemy character. Ever since that time the above principle has been commonly called the 'rule<sup>1</sup> of 1756,' although it is now proved<sup>2</sup> that, as early as

<sup>1</sup> *The Immanuel* (1799) 2 C. Rob. 186. A clear statement of the rule and the facts is given by Reddie, *Researches*, i. pp. 307-313. See also the literature quoted below, § 400 (n.); Phillimore, iii. §§ 212-222; Hall, § 234; Manning, pp. 260-267; Westlake, ii. p. 294; Moore, vii. § 1180; Boeck, No. 52; Dupuis, Nos. 131-133; Higgins, *War and the Private Citizen* (1912), pp. 169-192. Note that the original meaning of the rule of 1756 is different from the meaning it received by its extension in 1793. From that year onwards, England considered not only those neutral vessels which embarked upon the French coasting and colonial trade thrown open to them during the war with England as having acquired enemy character, but also those which carried neutral goods from

neutral ports to ports of a French colony. This extension of the rule was clearly unjustified, and it is not possible to believe that it will ever be revived.

<sup>2</sup> See Marsden, *Law and Custom of the Sea*, ii. (1916) p. 436, who mentions the case of the *Ceres*, the reference to which is H.C.A. Misc. 875 in the Public Record Office. There are even earlier cases. In 1604 the *Veniera* and the *Ponte*, Venetian vessels, were condemned by the Dutch Government for participation in Spanish closed trade; (British) Calendar of State Papers, Venice, 1603-1607, Nos. 184, 221, cited by Marsden in 25 *English Historical Review* (1910), p. 244, together with some others. See also Pares, *Colonial Blockade and Neutral Rights, 1739-1763* (1938).

1744, the British Prize Courts considered it a settled rule of law that a neutral vessel had no right in time of war to carry on such trade of a belligerent as was closed to it in time of peace.<sup>1</sup>

In the practice of declaring enemy coasts to be blockaded, and condemning captured neutral vessels for breach of blockade, although the blockades were by no means always effective, England followed other Powers.

As privateering was legitimate and in general use, neutral commerce was considerably disturbed during every war between naval States. In 1780, during the war between Great Britain on the one hand, and her American colonies, France, and Spain on the other, Russia sent a circular<sup>2</sup> to Great Britain, France, and Spain, in which she proclaimed the following five principles: (1) that neutral vessels should be allowed to navigate from port to port of belligerents, and along their coasts; (2) that enemy goods on neutral vessels, contraband excepted, should not be seized by belligerents; (3) that, with regard to contraband, Articles 10 and 11 of the Treaty of 1766 between Russia and Great Britain should be applied in all cases; (4) that a port should only be considered blockaded if the blockading belligerent had stationed vessels there, so as to create an obvious danger for neutral vessels entering the port; (5) that these principles should be applied in the proceedings and judgments on the legality of prizes. In July 1780 Russia<sup>3</sup> entered into a treaty with Denmark, and in August 1780 with Sweden, for the purpose of enforcing those principles by equipping a number of men-of-war. Thus the 'Armed Neutrality' made its appearance. In 1781 the Netherlands, Prussia, and Austria, in 1782 Portugal, and in 1783 the Two Sicilies joined the league. France, Spain, and the United States<sup>4</sup> of America accepted its principles without formally joining. The war between Great Britain, the United States, France, and Spain was terminated in 1783, and the war between Great Britain and

<sup>1</sup> As to the 'rule of 1756' in the Russo-Japanese War see above, § 89 (4); and in the World War, Verzijl, § 562.

<sup>2</sup> Martens, *R.*, iii. p. 158. See Reddie, *Researches*, i. pp. 321-357.

<sup>3</sup> Martens, *R.*, iii. pp. 189, 198.

<sup>4</sup> See Albrecht in *Z.V.*, vi. (1912) pp. 436-449; Carpenter in *A.J.*, xv. (1921) pp. 511-522, and Kulsrud, *ibid.*, xxix. (1935) pp. 423-447.

the Netherlands in 1784; but in the treaties of peace the principles of the 'Armed Neutrality' were not mentioned. This league had no direct practical consequences, since Great Britain retained her former standpoint. Moreover, some of the States that had joined it acted contrary to some of its principles when they themselves went to war—Sweden, for example, during her war with Russia in 1788-1790, and France and Russia in 1793—and some of them concluded treaties in which were stipulations at variance with these principles. Nevertheless, the First Armed Neutrality has proved of great importance, because its principles furnished the basis of the Declaration of Paris of 1856.<sup>1</sup>

The  
French  
Revolution and  
the  
Second  
Armed  
Neu-  
trality.

§ 290. The wars of the French Revolution and the Napoleonic Wars showed that the time was not yet ripe for the progress<sup>2</sup> aimed at by the First Armed Neutrality. Russia, the very same Power which had initiated the Armed Neutrality in 1780 under the Empress Catharine II. (1762-1796), joined Great Britain in 1793 in order to interdict all neutral navigation into ports of France, with the intention of subduing France by famine. Russia and Great Britain justified their attitude by the exceptional character of their war against France, which had proved to be the enemy of the security of all other nations. The French Convention answered with an order to the French fleet to capture all neutral ships carrying provisions to enemy ports, or carrying enemy goods.

But although Russia had herself acted in defiance of the principles of the First Armed Neutrality, she called a Second Armed Neutrality into existence in 1800, during the reign of the Emperor Paul. The Second Armed Neutrality was caused by the refusal of Great Britain to concede immunity from visit and search to neutral merchantmen under convoy.<sup>3</sup> Sweden was the first to claim in 1653, during the war between Holland and Great Britain, that the belligerents should not visit and search Swedish merchantmen under

<sup>1</sup> See Sailer, *Die bewaffnete Neutralität von 1780/1800 und ihre Auswirkung in der Pariser und der Londoner Seekriegsrechterklärung* (1933).

<sup>2</sup> See Reddie, *Researches*, i. pp. 418-

468; ii. pp. 1-232. And see, in particular, Phillips and Reede, *Neutrality*, vol. ii.: *The Napoleonic Period* (1936).

<sup>3</sup> See below, § 417.

convoy of Swedish men-of-war, provided that a declaration was made by the men-of-war that the merchantmen had no contraband on board. Other States later raised the same claim, and many treaties were concluded which stipulated the immunity from visit and search of neutral merchantmen under convoy. But Great Britain refused to recognise the principle, and when, in July 1800, a British squadron captured a Danish man-of-war and her convoy of several merchantmen for having resisted visit and search, Russia invited Sweden, Denmark, and Prussia to renew the 'Armed Neutrality,' and to add to its principles the further principle, that belligerents should not have a right of visit and search in case the commanding officer of the man-of-war, under whose convoy neutral merchantmen were sailing, should declare that the convoyed vessels did not carry contraband of war. In December 1800 Russia concluded treaties with Sweden, Denmark, and Prussia consecutively, by which the 'Second Armed Neutrality' became a fact.<sup>1</sup> It lasted only a year on account of the assassination of the Emperor Paul of Russia on March 23, and the defeat of the Danish fleet by Nelson on April 2, 1801, in the battle of Copenhagen. Nevertheless, the Second Armed Neutrality likewise proved of importance, for it led to a compromise in the 'Maritime Convention' made between Great Britain and Russia under the Emperor Alexander I. on June 17, 1801, at St. Petersburg,<sup>2</sup> to which Denmark and Sweden acceded on October 23, 1801. By Article 3 of this treaty, Great Britain recognised, as far as Russia was concerned, the rules that neutral vessels might navigate from port to port, and on the coasts, of belligerents, and that blockades must be effective. In the same article Great Britain forced Russia to recognise the rule that enemy goods on neutral vessels might be seized, and did not recognise the immunity

<sup>1</sup> Martens, *R.*, vii. pp. 127-202. See also Martens, *Causes célèbres*, iv. pp. 219-302, and Genet, ii. pp. 513-515.

<sup>2</sup> Martens, *R.*, vii. p. 260, and Krauel in *Festschrift der Berliner Juristenfakultät für Heinrich Brunner* (1914), pp. 69-107. Krauel (*op. cit.*, p. 97) denies that the stipulations

of the 'Maritime Convention' contained a compromise, because they did not concern all maritime Powers; but surely they did constitute a compromise between Great Britain on the one hand, and Russia, Denmark, and Sweden on the other. See also Phillips and Reede, *op. cit.*, pp. 107-111.



of neutral vessels under convoy from visit and search, although, by Article 4, she conceded that the right should in that case be exercised only by men-of-war, and not by privateers.

But this compromise did not last long. When, in November 1807, war broke out between Russia and Great Britain, Russia, in her declaration of war,<sup>1</sup> annulled the Maritime Convention of 1801, proclaimed anew the principles of the First Armed Neutrality, and asserted that she would never again drop them. Great Britain, in her counter-declaration,<sup>2</sup> proclaimed her return to those principles against which the First and the Second Armed Neutralities were directed, and she was able to point out that no Power had applied these principles more severely than had Russia under the Empress Catharine II. after she had initiated the First Armed Neutrality.

Thus all progress made by the Maritime Convention in 1801 fell to the ground. Times were not favourable to any progress. After Napoleon's Berlin Decrees in 1806,<sup>3</sup> ordering the boycott of all British goods, Great Britain declared all French ports, and all the ports of the allies of France, blockaded, and ordered her fleet to capture all ships destined to them.

§ 291. The development of the rules of neutrality during the nineteenth century was due to four factors.

(1) The most prominent and influential factor was the attitude of the United States of America towards neutrality from 1793 to 1818.<sup>4</sup> When Great Britain in 1793 joined the war which had broken out in 1792 between the so-called First Coalition and France, Genêt, the French diplomatic envoy accredited to the United States, granted letters of marque to American merchantmen manned by American citizens in American ports. These privateers were destined to cruise against British vessels, and French Prize Courts

<sup>1</sup> Martens, *R.*, viii. p. 706.

<sup>2</sup> Martens, *R.*, viii. p. 710.

<sup>3</sup> See Sherman in *A.J.*, xvi. (1922) pp. 400-419 and pp. 561-584.

<sup>4</sup> See Westengard in *Journal of Comparative Legislation*, New Ser., xl. (1917) pp. 10-12; Hyneman in

*A.J.*, xxiv. (1930) pp. 279-309; the same, *The First American Neutrality* (1934); Phillips and Reede, *op. cit.*, pp. 170-209. See also Savage, *Policy of the United States towards Maritime Commerce in War*, vol. i., 1776-1914 (1934).

were set up by the French minister in connection with French consulates in American ports. On the complaint of Great Britain, the Government of the United States ordered these privateers to be disarmed and the French Prize Courts to be closed down.<sup>1</sup> As the trial of Gideon Henfield,<sup>2</sup> who was acquitted, proved that the Municipal Law of the United States did not prohibit the enlistment of American citizens in the service of a foreign belligerent, Congress in 1794 passed an Act temporarily forbidding American citizens from accepting letters of marque from a foreign belligerent or enlisting in the army or navy of a foreign State, and forbidding the fitting out and arming of vessels intended as privateers for foreign belligerents. Other Acts were passed from time to time. Finally, on April 20, 1818, Congress passed a Foreign Enlistment Act, which contained provisions intended to be permanent, and was the basis of the British Foreign Enlistment Act of 1819. Thus the United States initiated the present practice, according to which it is the duty of neutrals to prevent the fitting out and arming on their territory of cruisers for belligerents, to prevent recruitment on their territory for belligerents, and the like.

(2) Of great importance became the permanent neutralisation of Switzerland and Belgium.<sup>3</sup> These States naturally adopted, and retained, throughout every war during that century, an exemplary attitude of impartiality towards the belligerents; and each time war broke out in their vicinity they took effectual military measures to prevent belligerents from using their neutral territory and resources.

(3) The third factor was the Declaration of Paris of 1856, which incorporated into International Law the rule 'free ship, free goods,' the rule that neutral goods on enemy ships must not be appropriated, and the rule that blockades must be effective.<sup>4</sup>

(4) The fourth factor was the general development of the military and naval resources of all members of the Family of Nations. As during the second half of the nineteenth century all the larger States were obliged to keep their armies

<sup>1</sup> See Wharton, iii. §§ 395-396.

<sup>2</sup> See Taylor, § 609.

<sup>3</sup> See above, vol. i. §§ 98, 99.

<sup>4</sup> See above, § 177.

and navies in constant readiness for war, it followed that, whenever war broke out, each belligerent was anxious not to injure neutral States lest they should take the part of the enemy. On the other hand, neutral States were always anxious to fulfil the duties of neutrality for fear of being drawn into the war.

Neu-  
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§ 292. This development continued up to the outbreak of the World War in 1914. The South African and Russo-Japanese Wars<sup>1</sup> produced several incidents which gave occasion for the Second Hague Conference of 1907 to bring neutrality within the range of its deliberations, and to agree upon Convention V. respecting the Rights and Duties of Neutral Powers and Persons in War on Land,<sup>2</sup> and Convention XIII. respecting the Rights and Duties of Neutral Powers in Naval War<sup>3</sup>; neither of these Conventions, however, has been ratified by Great Britain. Moreover, some of the other Conventions agreed upon at this Conference, although they do not directly concern neutral Powers, are indirectly of great importance to them.<sup>4</sup> Thus Convention VII., relative to the Conversion of Merchant-ships into Warships, indirectly concerns neutral trade as well as the Convention VIII. relative to the Laying of Automatic Submarine Contact Mines, and Convention XI. relative to certain Restrictions on the Exercise of the Right of Capture.

<sup>1</sup> Campbell, *Neutral Rights and Obligations in the Anglo-Boer War* (1908); Baty, *International Law in South Africa* (1900); Lerouse, *Le droit international pendant la guerre maritime russo-japonaise* (1924).

<sup>2</sup> See Lémonon, pp. 407-425; Higgins, pp. 290-294; Boidin, pp. 121-134; Nippold, § 25; Scott, *Conferences*, pp. 541-555; Bustamante in *A.J.*, ii. (1908) pp. 95-120.

<sup>3</sup> See Lémonon, pp. 555-603; Higgins, pp. 457-483; Bernstein, § 13; Boidin, pp. 237-247; Dupuis, *Guerre*, Nos. 277-330; Nippold, § 34; Scott, *Conferences*, pp. 620-648; Hyde in *A.J.*, ii. (1908) pp. 507-527.

<sup>4</sup> In informing the Secretary-General of the League of her intention to remain neutral in the war which broke out with Germany in September 1939, Argentina stated that the Hague Conventions of 1899 and 1907 would

constitute the rules for the enforcement of her neutrality: *League of Nations, Monthly Summary*, 1939, p. 318. Mexico, Venezuela, Uruguay, and some other States similarly announced that their neutrality would be based on the Hague Conventions. This was so because, as stated in the Argentine proclamation of neutrality of September 4, 1939, 'notwithstanding the Conventions of 1907 lack legislative approval, they possess the greatest value as a source of doctrine to determine the rights and duties of neutral states and persons and have already been invoked by this Government in previous similar cases.' Similar reasons were given by the Chilean Government in declaring applicable, in the Neutrality Decree of September 8, 1939, the Hague Conventions No. V. and No. XIII. and the Declaration of London.

By Convention XII. the Conference agreed upon the establishment of an International Prize Court to serve as a Court of Appeal from decisions of the Prize Courts of either belligerent which concerned the interests of neutral Powers or their subjects; but this Convention secured no ratification.<sup>1</sup> In order to find a basis of generally accepted prize law on which the proposed court might found its judgments, a Naval Conference met in London in 1908, and in 1909 produced the Declaration of London concerning the laws of naval war, which represented a code comprising rules respecting blockade, contraband, unneutral service, destruction of neutral prizes, transfer to neutral flag, enemy character, convoy, resistance to search, and compensation.

During the Turco-Italian War, the first naval war fought after the Declaration had been drawn up, both belligerents complied with it, although it had not been ratified by any Power, and Turkey was not even a signatory. When the World War came, the Declaration was still unratified; but the United States of America at once invited both groups of belligerents to adopt it, although it had not become legally binding. Germany and Austria-Hungary agreed on condition that their enemies did the same; but Great Britain, France, and Russia were only prepared to adopt the Declaration with certain modifications.<sup>2</sup> This they in fact did during the first part of the war. Great Britain, for example, by an Order in Council of August 20, 1914,<sup>3</sup> put the Declaration into force, rejecting, however, its lists of contraband, and modifying its rules as to false papers,<sup>4</sup> destination of contraband,<sup>5</sup> and knowledge of the existence of a blockade.<sup>6</sup> This Order also directed the courts to regard the General Report of the Drafting Committee as an authoritative statement of the meaning and intention of the Declaration.<sup>7</sup> For the Order of August 20, 1914, a new Order was substituted on October 29, 1914.<sup>8</sup> By this new

<sup>1</sup> See below, §§ 438-447.

<sup>2</sup> Above, vol. i. § 50a; *A.J.*, ix. (1915), Special Suppl., pp. 1-8; and *Verzijl*, §§ 50-54.

<sup>3</sup> The Declaration of London Order in Council (No. 1), 1914; *London Gazette*, August 21, 1914.

<sup>4</sup> See below, § 404.

<sup>5</sup> See below, § 403a.

<sup>6</sup> See below, § 384.

<sup>7</sup> See above, vol. i. § 554 (8).

<sup>8</sup> The Declaration of London Order in Council (No. 2), 1914; *London Gazette*, October 30, 1914.

Order the Declaration remained in force, but with additional modifications as to the carriage of contraband<sup>1</sup> and without any direction as to the General Report. A further Order of October 20, 1915,<sup>2</sup> withdrew Article 57, which provided that the neutral or enemy character of a vessel was to be determined by the flag which she was entitled to fly<sup>3</sup>; and an Order of March 30, 1916,<sup>4</sup> withdrew Article 19, relating to capture for breach of blockade,<sup>5</sup> and made further modifications in the rules as to contraband.

This was the last of the Declaration of London Orders in Council. For by a joint memorandum of July 7, 1916,<sup>6</sup> Great Britain and France notified the neutral Powers that, whereas at the beginning of the war the Allied Governments had adopted the Declaration because it seemed to present in its main lines a statement of the rights and duties of belligerents based on the experience of previous naval wars, as the World War had developed it became clear that its rules, while not in all respects improving the safeguards afforded to neutrals, did not provide belligerents with the most effective means of exercising their admitted rights. These rules, they argued, could not stand the strain imposed by the test of rapidly changing conditions and tendencies which could not have been foreseen, and they had therefore come to the conclusion that they must confine themselves simply to applying the historic and admitted rules of the Law of Nations. In pursuance of this policy, Great Britain by the Maritime Rights Order in Council of July 7, 1916,<sup>7</sup> withdrew all the Declaration of London Orders in Council, declared that she would exercise her belligerent rights at sea in strict accordance with the Law of Nations, and laid down four special rules with regard to contraband<sup>8</sup> and continuous voyage.<sup>9</sup>

From July 7, 1916, therefore, the Declaration of London

<sup>1</sup> See below, § 403a.

<sup>2</sup> The Declaration of London Order in Council, 1915; *London Gazette*, October 26, 1915.

<sup>3</sup> See above, § 89.

<sup>4</sup> The Declaration of London Order in Council, 1916; *London Gazette*, March 31, 1916.

<sup>5</sup> See below, § 385 (n.).

<sup>6</sup> Parl. Papers, Misc. No. 22 (1916), Cmd. 8293; and above, vol. i. § 50a.

<sup>7</sup> *Ibid.*, and *London Gazette*, July 11, 1916.

<sup>8</sup> See below, §§ 391-406a.

<sup>9</sup> See below, §§ 385 (n.), 403a.

was no longer applied, even in part, and it still remains unratified.<sup>1</sup> Uncertainties in maritime law, which the Declaration was intended to abolish, were before the war regarded as among the chief obstacles to the proposed International Prize Court, and as many uncertainties still exist to-day.

§ 292A. Apart from the fate of the Declaration of London, the World War wrought important changes in current con-ceptions of neutrality. All the Great Powers and numerous other States took part in the struggle, and among the war-tired peoples of the belligerents the view was prevalent that a neutral 'shirks his share of the burden of humanity.'<sup>2</sup> Such an attitude was natural enough in the circumstances, and there was a tendency to expect its recurrence in any future war in which, in the opinion of the generality of mankind, one belligerent side should be waging the struggle for the vindication of a cause clearly transcending its national interests.<sup>3</sup> Moreover, it was rightly assumed that the Covenant of the League of Nations, without abolishing the institution of neutrality either generally or in relation to its members, vitally affected its character as an attitude of absolute impartiality.<sup>4</sup> The General Treaty for the Renunciation of War, although it did not effect an express alteration in the law of neutrality, brought about a fundamental change in the status of war in International Law—a development which, it was thought, must in the long run influence the institution of neutrality.<sup>5</sup>

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However, in 1936 and in subsequent years it became apparent that the legal limitations or prohibitions of recourse

<sup>1</sup> For the arguments for and against ratification as they appeared before the World War see Smith, *International Law*, 4th ed. (1911), pp. 353-371, and the literature cited above, vol. i. § 568b (n.).

<sup>2</sup> Before the World War, Westlake gave expression to the same view: 'Neutrality is not morally justifiable unless intervention in war is unlikely to promote justice, or could do so only at a ruinous cost to the neutral,' for 'the general duty of every member of the society is to promote justice' (vol. ii. p. 90).

<sup>3</sup> For an expression of a sceptical view on the frequent belligerent claim to conduct the war on behalf of a right cause see Jessup, *Neutrality*, vol. iv., *Today and Tomorrow* (1936), pp. 77-82. This view is probably intended as an expression of the opinion that the law of neutrality must remain indifferent to the moral issues involved. It need not be interpreted as an affirmation of the conviction that the cause of either belligerent is invariably outside the pale of moral judgment.

<sup>4</sup> See below, §§ 292a-292g.

<sup>5</sup> See below, §§ 292h-292i.

to war were not likely to be generally observed, and that, following upon the setback to the system of collective security established by the Covenant of the League,<sup>1</sup> the possibility of another war of wide dimensions was increasing rapidly. From the situation thus created many States drew the conclusion that their interest lay not in a concentration of effort to save from final disruption the shaken fabric of peace, but in a determined endeavour to safeguard their neutrality in all circumstances. The United States led the way by enacting legislation in which it imposed upon its citizens far-reaching restrictions upon their intercourse with belligerent countries.<sup>2</sup> The object of these restrictions

<sup>1</sup> See above, § 52e.

<sup>2</sup> In November 1939 a Neutrality Act was passed which, while repealing the previous Neutrality Act of 1937 in so far as it prohibited the sale to belligerents of arms, munitions, and implements of war, retained most of its other provisions and amplified some of them. In particular, American vessels (including aircraft) were prohibited, subject to certain exceptions, from carrying passengers or goods to any belligerent State. It was provided that, with some exceptions, all title and interest in goods to be exported or transported to a belligerent country must be transferred to foreign ownership before leaving the United States. The extension of credit, for any purpose whatsoever, to a belligerent Government or its agents was prohibited, and so was the extension of credit to any private person in a belligerent State in connection with the sale of arms, munitions, and implements of war. Finally, it was provided that no American citizen or vessel may enter a combat area as defined either in the Neutrality Act or by the President. This included, in addition to the ports in France, Great Britain, and Germany, the ports in Ireland, in Norway south of Bergen, in Sweden, Denmark, Holland, Belgium, and in Baltic countries. On the United States Neutrality Acts of 1935, 1937, and 1938 see Spencer in *Z.ö.V.*, v. (1935) pp. 293-309; Jessup in *A.J.*, xxix. (1935) pp. 665-670, xxx. (1936) pp. 262-265, xxxi. (1937) pp. 306-312, and xxxiii. (1939) pp. 119-126, 549-

557; Eagleton in *New York University Law Quarterly Review*, xiii. (1935) pp. 72-81, and in *R.I.*, 3rd ser., xvii. (1936) pp. 461-474; Woolsey in *A.S. Proceedings*, 1935, pp. 72-80, and in *A.J.*, xxx. (1936) pp. 256-262; J. Dickinson in *A.S. Proceedings*, 1935, pp. 106-116; Fairman in *R.G.* xlii. (1935) pp. 678-696 (on the application of the neutrality legislation to the Italo-Abyssinian War); Garner in *B.Y.*, xvii. (1936) pp. 45-53, and xix. (1938) pp. 44-66; the same in *International Affairs*, xvi. (1937) pp. 853-870, and in *A.J.*, xxxi. (1937) pp. 385-397; Hyde in *Yale Law Journal*, 45 (1936), pp. 608-621, and in *University of Pennsylvania Law Review*, 85 (1937), pp. 344-357; Belin in *R.G.*, xliii. (1936) pp. 416-436; Keppler in *Z.V.*, xxi. (1937) pp. 173-206, 289-419; Bradley in *American Political Science Review*, 31 (1937), pp. 100-113; Bottié in *R.I. (Paris)*, xix. (1937) pp. 82-129; Dumbauld in *A.J.*, xxxi. (1937) pp. 258-270; Kunz in *Z.ö.R.*, xvii. (1937) pp. 85-121; Eckhardt in *Z.ö.V.*, viii. (1938) pp. 231-256; Whitton in *R.G.*, xlv. (1938) pp. 567-580; Borchard in *Yale Law Journal*, 48 (1938), pp. 37-53; McLaughlin in *Minnesota Law Review*, 22 (1938), pp. 603-660. For the texts of the Act of 1935 see *A.J.*, xxx. (1936), Suppl., pp. 58-66; of the Joint Resolution of February 29, 1936, extending the Neutrality Act of 1935, see *ibid.*, p. 109; of the Neutrality Act of May 1, 1937, see *Documents*, 1937, p. 600; *A.J.*, xxxi. (1937) p. 147; of the United States Neutrality Proclama-

was to lessen the danger of the United States being involved in war either as the result of actively defending the interests of its citizens injuriously affected by belligerent measures, or, indirectly, in consequence of the United States acquiring an economic interest in the victory of one of the opposing belligerents. At the same time Belgium and Holland formally affirmed their attitude of neutrality.<sup>1</sup> Switzerland made a final effort to place her neutrality beyond doubt by severing the slender ties associating her with the system of sanctions.<sup>2</sup> The Scandinavian States followed, in respect of sanctions, the same path,<sup>3</sup> though in a different manner. But it was in particular the attitude of the United States, as outlined above, which, when in 1939 war broke out between the Allied Powers and Germany, showed clearly that a new factor had appeared in the relations of the belligerents and the neutrals. That factor was the voluntary abandonment on the part of neutrals of the exercise of numerous rights hitherto jealously asserted against the belligerents. It was a matter of speculation how far and how soon that change of attitude, if persisted in, would affect the rights and duties of neutrals as hitherto determined by International Law.

At the same time there reappeared, in a form less pronounced than the Armed Neutralities, the tendency to strengthen the position of neutrals by a joint affirmation of the rules of neutrality and by provision of consultation between neutrals. In 1938 the four Scandinavian States agreed on a code of neutrality rules to form part of their municipal legislation and bound themselves not to modify

tion of September 5, 1939, based on the Act of 1937, see *International Conciliation*, No. 353 (1939), pp. 466-480; of the Act of 1939, *ibid.*, No. 355, pp. 609-620, and *A.J.*, xxxiv. (1940), Suppl., pp. 44-55. See also *ibid.*, pp. 55-74, for various regulations and proclamations under the Act. See also Wright, *The United States and Neutrality* (Public Policy Pamphlet No. 17, 1935); Jessup, *op. cit.* (at p. 487); Chaumont, *La conception américaine de la neutralité* (1936); Borchard and Lage, *Neutrality for the*

*United States* (1937); Deák, *The United States Neutrality Acts* (*International Conciliation*, No. 358, March 1940). On the attitude of American States generally see Cereti, *Pan-americanismo e diritto internazionale* (1939), pp. 207-252.

<sup>1</sup> See vol. i. § 99.

<sup>2</sup> See below, § 292g.

<sup>3</sup> See above, p. 141. See also Morgenthau in *The American Political Science Review*, 33 (1939), pp. 473-486.



them without a previous exchange of views.<sup>1</sup> In October 1939, twenty-one American Republics, including the United States, adopted a General Declaration of Neutrality, laying down the principles of neutrality to be observed in the European conflict and providing for consultation in certain matters and for the establishment of an Inter-American Neutrality Committee composed of experts in International Law.<sup>2</sup>

With regard to the Declaration of London it appeared that Great Britain and France, without making any formal pronouncement to that effect, proceeded on the basis of the situation as it had crystallised in the concluding stages of the World War. Previously, in various agreements concluded after the World War and relating to claims connected with the conduct of war, the former belligerents and neutrals formally reaffirmed their respective standpoints.<sup>3</sup> The Declaration of London definitely ceased to be of legal importance except in so far as it embodied generally acknowledged principles and rules of International Law. Its numerous provisions which settled controversial questions by way of a political compromise could no longer be appealed to. Thus, for instance, the lists of contraband published in September 1939 by Great Britain, France, and Germany, although shorter than those announced during the World War, were most comprehensive in scope.<sup>4</sup> The changes which took place between 1918 and 1939 in the direction of what acquired the name of totalitarian warfare tended,<sup>5</sup> notwithstanding neutral protests, to lend substance to that assertion of effective belligerent rights. For as the scope of the war increased in respect of numbers of direct and indirect combatants and of the vast variety of instruments of modern warfare, there was bound to take place a corresponding curtailment of the range of articles and activities

<sup>1</sup> See above, p. 183.

<sup>2</sup> For the Final Act of the Consultative Meeting of Foreign Ministers of the American Republics at Panama from September 23 to October 3, 1939, see *International Conciliation*, January 1940, No. 356; *A.J.*, xxxiv. (1940), Suppl., p. 1. See also Jessup,

*Neutrality*, vol. iv., *Today and Tomorrow* (1936), pp. 160-206, on attempts at neutral co-operation in the past and proposals for the future.

<sup>3</sup> See below, p. 736, n. 3.

<sup>4</sup> See below, p. 663.

<sup>5</sup> See above, p. 171.

with regard to which the belligerents were inclined to refrain from interference with neutral commerce and communications. This factor as well as the various retaliatory measures adopted in turn by the belligerents signified serious encroachments upon the rights of neutrals as hitherto understood. It was not until Germany invaded Denmark and Norway in April and Belgium, Holland, and Luxemburg in May 1940, that neutral status as such and the very independence of neutral nations as distinguished from particular neutral rights were ruthlessly violated by a lawless belligerent, and that other neutral States found themselves similarly and increasingly menaced from the same side. Nevertheless, in the first period of what some tended to describe as the second World War, neutrality constituted a prominent feature of the situation. At the time of writing it was too early to assess the likelihood of a repetition of the experience of the first World War in which neutrality was in the end voluntarily and almost universally abandoned in a collective effort to uphold the rule of law among nations.

## II

### NEUTRALITY AND THE LEAGUE OF NATIONS

Fauchille, §§ 1446 (11)-1446 (13)—Hyde, ii. § 889—Fenwick, pp. 532-535—Hatschek, pp. 65-68—Schücking und Wehberg, pp. 600-636, 667, 668—Hoijer, pp. 199-207, 434-451—Barandon, pp. 344-348—Kunz, pp. 303-319—Genet, §§ 373-375—Hadjiscos, *Les sanctions internationales de la Société des Nations*, i. (1920) pp. 199-207—League Doc. A. 14. 1927. V. (Report and Resolutions on the Subject of Article 16 of the Covenant), pp. 83-88—Wright, *The Future of Neutrality* (International Conciliation Pamphlet No. 242, 1928), and the same in *A.J.*, xxi. (1927) pp. 127-138—Cohn, *Kriegsverhütung und Schuldfrage* (1929), pp. 29-88, 178-199, and the same in *Les origines et l'œuvre de la Société des Nations*, ii. (1924) pp. 153-204 (*Neutralité*)—Haase, *Wandlung des Neutralitätsbegriffes* (1932)—Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933), pp. 346-361—Michailides, *La neutralité et le Société des Nations* (1933)—Politis, *La neutralité et la paix* (1935), pp. 90-128 (also in English translation)—Bottié, *Essai sur la genèse et l'évolution de la notion de neutralité* (1937), pp. 307-355—Llanas in *R.I. (Geneva)*, i. (1923) pp. 112-115—*ibid.*, ii. (1924) pp. 41-47—Graham in *California Law Review*, xv. (1927) pp. 357 et seq.—Whitton in *Hague Recueil*, 1927 (ii.), pp. 476-567—Wehberg in

*Friedenswarte*, xxix. (1929) pp. 131-140—Jessup in *A.S. Proceedings*, 1933, pp. 134-142—Kunz, *ibid.*, 1935, pp. 36-42—Nova in *Annali di scienze politiche*, 6 (1933), pp. 237-254; *ibid.*, 7 (1934), pp. 109-145, 257-295; *ibid.*, 8 (1935), pp. 57-100, 167-225—Leresche in *R.I.F.*, ii. (1936) pp. 19-35, 131-152—Sandberg in *Acta Scandinavica*, x. (1939) pp. 83-108. See also the literature referred to in §§ 52b and 292h.

Neutrality and the League of Nations.

§ 292a. In wars between members of the League which are not commenced in disregard of the obligations of Articles 12, 13, or 15,<sup>1</sup> the relations between the belligerents and the other members of the League are governed by the accepted rules of neutrality. This being so, it is misleading to give currency to the view that the Covenant has abolished neutrality. Such an opinion is as inaccurate as the one according to which the Covenant has not affected neutrality at all. The correct view seems to be that while in some cases, in particular in cases where resort to war is not contrary to the Covenant, the latter has not altered the law of neutrality, it has, without abolishing it, vitally affected it in those cases in which members of the League are bound or authorised to apply sanctions under Article 16.

Article 16: the Economic and Financial Sanctions.<sup>2</sup>

§ 292b. A member of the League which resorts to war in disregard of its obligations under certain articles of the Covenant is *ipso facto* deemed to have committed an 'act of war' against all other members of the League. This, as has been shown,<sup>3</sup> does not necessarily mean that a state of war automatically thereupon arises; it means that any or all of the other members of the League may at their option lawfully and justly accept the challenge and treat

<sup>1</sup> See above, §§ 25d-25f. This includes cases in which both parties have resorted to war in breach of the Covenant, or in which it is not yet authoritatively ascertained which of the belligerents has disregarded his obligations under the Covenant. The original declarations of neutrality in the war in 1933 and 1934 between Bolivia and Paraguay are probably included in the latter category. See Toynbee, *Survey*, 1933, p. 419; see also *Bulletin de l'Institut Juridique International*, xxii. (1935) pp. 13-18, for a circular despatch of the Chilean Minister for Foreign Affairs concerning the Chilean declaration of neutrality. See also *ibid.*, pp. 236-238,

for a supplementary despatch. Subsequent to the finding of the Assembly and to the resolution of its Advisory Committee (see § 52f), which amounted to a declaration that Paraguay was resorting to war contrary to the provisions of the Covenant, the neutral States were under no duty to abandon their neutrality, but they were bound, while choosing to remain neutral, to adopt the various measures of discrimination against the offending State in conformity with the comprehensive terms of Article 16 (see § 292b).

<sup>2</sup> See above, § 52e.

<sup>3</sup> See above, § 52e.

it as creating a state of war, but that unless it does so it is not at war with the Covenant-breaking State.<sup>1</sup> It remains neutral, and it can enforce the sanctions which affect its own Government and its own nationals (including aliens resident or carrying on business within its own territory). Such measures would normally constitute an abandonment of the attitude of impartiality incumbent upon neutrals, and would, as such, be a violation of neutrality. But—and here reveals itself the important innovation introduced by the Covenant in the law of neutrality—the Covenant-breaking belligerent must be deemed to have, by signing the Covenant, consented in advance to measures of discrimination being applied against him by those members of the League who do not elect to declare war upon him.<sup>2</sup>

A special difficulty arises in connection with that provision of Article 16 which refers to 'the prevention of all financial, commercial, or personal intercourse between the nationals of the Covenant-breaking State *and the nationals of any other State, whether a member of the League or not.*' Intercourse involves transit by land, by air, or by sea. As regards land transit, a Covenant-enforcing State could lawfully prevent intercourse with an adjacent Covenant-breaking State by closing that frontier without declaring war. As regards air transit, it could lawfully achieve this end by the exercise of its sovereign control over the air space above its territory and territorial waters; subject

<sup>1</sup> See above, §§ 52e (n.), 55, 96, and see *Records of First Assembly, Plenary Meetings*, pp. 398, 400, and *Records of Second Assembly, Plenary Meetings*, pp. 415, 431.

<sup>2</sup> This combination of the right to remain neutral with the duty (as it existed at that time) to apply sanctions explains the apparent but not real inconsistency between the fact that in the course of the Italo-Abyssinian war Great Britain recognised the applicability of Hague Convention No. XIII. while maintaining at the same time that 'we do not consider that any Covenant-breaking State has any legal right to require the observance by other members of

the League of any rules of neutrality' (statement by the Secretary of State for Foreign Affairs on October 23, 1935: 305 *H.C. Deb.*, 218, 219). During the Russo-Finnish war (see above, p. 137) in 1939 and 1940 Great Britain, France, and other members of the League, acting in pursuance of a recommendation of the Assembly (see above, p. 143), lent to Finland a measure of assistance which, but for the provisions of the Covenant, would have constituted a breach of obligations of neutrality. Article 16 of the Covenant, rather than the absence of a declared state of war, provided the legal justification of substantial assistance rendered to Finland by the several members of the League.

to the Convention for the Regulation of Aerial Navigation of 1919<sup>1</sup> (which, however, does not affect the freedom of action of the parties in time of war as belligerents or neutrals), and to any similar conventions. As regards sea transit, however, it would be difficult, if not impossible, for a State lawfully to give effect to the undertaking under discussion except by declaring a state of war to be in existence and by exercising the rights of a belligerent against neutrals which accrue from the establishment of an effective blockade. In short, a declaration of war is almost essential before members can effectively prevent intercourse between the nationals of all other States and those of the Covenant-breaking State.<sup>2</sup>

Article  
16:  
Military,  
Naval,  
and Air  
Force.

§ 292c. Every member of the League who complies with the recommendation of the Council that he should contribute any military, naval, or air force for the purpose of the protection of the Covenant, almost of necessity<sup>3</sup> must become a belligerent, and thereupon all other States not co-operating in the application of armed force become neutrals, whether members of the League or not; while the rights of members of the League as neutrals, and the rights of a Covenant-breaking belligerent as against neutrals, become subject to such diminution as signature of the Covenant may involve.<sup>4</sup>

<sup>1</sup> See vol. i. §§ 197a-197c.

<sup>2</sup> If, then, war is declared between a Covenant-enforcing State and a Covenant-breaking State, the 'other States,' the intercourse of whose nationals is to be prevented, seem to fall into the following main categories:

(i) States, whether members of the League or not, which declare war and co-operate, thus becoming allies or associates;

(ii) States, not members of the League, which decide not to declare war or to co-operate, and therefore remain neutral and are entitled to claim the observance of their rights as such;

(iii) States, members of the League, which on account of their geographical situation or the smallness of their population, or their sympathy with

the Covenant-breaking State, or for some other reason, decide not to declare war or to co-operate, and therefore remain neutral and are entitled to claim the observance of their rights as such; except in so far as they may have surrendered them by the Covenant (particularly Articles 16 and 20).

<sup>3</sup> See above, §§ 55, 96, as to the use of armed force not amounting to war.

<sup>4</sup> The principal question considered in this Section is how far the obligations of Article 16 of the Covenant impose upon members of the League the duty to adopt an attitude inconsistent with neutrality. But the Covenant gives rise also to another question, namely, how far, in wars not prohibited by the Covenant, the third States, members of the League, are under a duty to preserve neutrality. The correct answer

§ 292d. Members of the League have agreed by this article 'to afford passage through their territory to the forces of any of the members of the League which are co-operating to protect the covenants of the League.' While the grant of this facility to a belligerent was in the eighteenth century entirely consistent with neutrality, the reverse is now generally recognised to be the case,<sup>1</sup> and Article 2 of Hague Convention V. addresses an express prohibition to belligerents which by implication extends to neutrals. Normally, therefore, it would be impossible for a member of the League lawfully to act on that provision of Article 16 without declaring war and co-operating as an ally or associate; but here again it may be said that the Covenant-breaking member of the League against whom force is being used has consented in advance to its fellow-members granting unneutral facilities, and is therefore debarred from complaining that a breach of neutrality has occurred.<sup>2</sup> This is so notwithstanding the fact that as the result of various declarations made in and before 1938 and amounting to an unilateral denunciation of the obligations of Article 16<sup>3</sup> there is at present probably no legal duty to permit the passage of troops proceeding against the Covenant-breaking State.<sup>4</sup>

Article  
16: Right  
of Passage  
for Armed  
Forces.

§ 292e. A State, not a member of the League, which accepts under Article 17<sup>5</sup> the obligations of membership for the purposes of a dispute, places itself in the same position, as regards Article 16, as a member. But a State, not a member of the League, which refuses to accept these obligations has a better right than a member to insist that, if war is declared against it, any State which declines to co-operate

Article 17.

is probably that they cannot in such cases declare war on any of the belligerents unless under the conditions laid down in the Covenant, i.e. before exhausting the means of pacific settlement provided therein.

<sup>1</sup> See below, § 323.

<sup>2</sup> See the Draft Collective Note upon Article 16 addressed to Germany by the 'Locarno' Powers as part of the Locarno arrangement: Misc. No. 11 (1925), Cmd. 2525; *A.J.*, xx. (1926), Suppl., p. 32; and the

case of Switzerland discussed below.

<sup>3</sup> See above, p. 141.

<sup>4</sup> In 1940 Sweden and Norway gave a negative reply to the enquiry by Great Britain and France whether they would permit the passage of Allied troops which it was intended to send to Finland in pursuance of the Resolution of the Assembly in the matter of the Russo-Finnish War (see above, p. 137).

<sup>5</sup> See above, § 25g.

as a co-belligerent with the States applying sanctions must strictly perform its duties as a neutral, and must not, for instance, grant a right of passage for troops. States, not members of the League, have not consented in advance, as, ✓ it may be argued, members of the League have done, to any derogation of their rights as belligerents in the matter of neutrality.

Neutral-  
ity  
Treaties  
made by  
Members  
of the  
League.

§ 292f. Not infrequently two States make a treaty whereby they reciprocally pledge themselves that in the event of either of them becoming involved in a war, or in a war with a certain State, the other will remain neutral. Such an agreement is usually described as a Neutrality Treaty.<sup>1</sup> Members of the League in negotiating treaties of this kind are under a duty to examine closely the terms of the reciprocal undertaking proposed, in order that they may not conflict with the terms of Articles 16 and 20<sup>2</sup> of the Covenant by which they are already bound.<sup>3</sup>

Switzer-  
land.

§ 292g. The status of Switzerland as a member of the League and the special terms of her admission are discussed in vol. i. § 98. The need for a special status sprang from the fact of her permanent neutralisation, and one of the

<sup>1</sup> Sometimes the agreement of reciprocal neutrality is accompanied by a further undertaking by each State to give active belligerent aid to the other in the event of an attack by two States, as in the case of the Anglo-Japanese Alliance of 1902; in such a case the treaty would usually be said to create an 'alliance' (see vol. i. §§ 569-573).

<sup>2</sup> See Lauterpacht in *B.Y.*, xvii. (1936) pp. 54-66.

<sup>3</sup> See the Treaty between Italy and the Serb-Croat-Slovene State of January 27, 1924: *L.N.T.S.*, xxiv. pp. 33-35. It was thought for a time (see, e.g., Schücking und Wehberg, p. 668) that treaties of neutrality concluded by members of the League, either with one another or with third States, are opposed to the obligations of Article 16, but there is probably no warrant for this opinion. These treaties were as a rule framed with due regard to the contingencies that may arise under the Covenant. Thus,

e.g., the Pact of Friendship, Non-Aggression and Neutrality between Italy and Soviet Russia of September 2, 1933, provided, in Article 2, as follows: 'If either of the High Contracting Parties is attacked by one or more Powers, the other High Contracting Party undertakes to observe neutrality during the whole period of the conflict. If one of the High Contracting Parties attacks a third Power, the other High Contracting Party has the right to denounce the present Pact without notice' (*Documents*, 1933, p. 233). For an enumeration of some of the neutrality treaties of the members of the League see Barandon, pp. 346, 347. See also Jessup in *A.S. Proceedings*, 1933, pp. 139-141, and Cohn, *op. cit.*, pp. 72, 73. See Graham in *A.J.*, xxiii. (1929) pp. 336-350, on Soviet Russia's treaties of neutrality; and Rutenberg in *Z.V.*, xiv. (1927) pp. 370-383, 548-558, on the neutrality treaty between Germany and Lithuania.

terms of her admission was that she 'shall not be forced to participate in a military action or to permit the passage of foreign troops, or the preparation of military enterprises upon her territory.'<sup>1</sup> In May 1938 the Council of the League adopted a resolution in which it took note of the intention of Switzerland not to participate in any way in the future in the execution of the provisions of the Covenant relating to sanctions, whether military or economic.<sup>2</sup>

## IIA

### NEUTRALITY AND THE GENERAL TREATY FOR THE RENUNCIATION OF WAR

Barandon, pp. 348-357—Whitton, *What follows the Pact of Paris?* (International Conciliation Pamphlet No. 276, 1929), and in *R.G.*, xxxix. (1932) pp. 5-53—Lord Eustace Percy, *Maritime Trade in War* (1930), pp. 14-32, 66-114—Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933), pp. 362-368—Politis, *La neutralité et la paix* (1935), pp. 129-221—Bottié, *Essai*

<sup>1</sup> *Message from the Federal Council of Switzerland to the Federal Assembly*, August 4, 1919 (English ed.), pp. 198-210; Hatschek, pp. 65-68; Borgeaud, *La neutralité suisse au centre de la Société des Nations* (2nd ed., 1921); Rappard, *L'entrée de la Suisse dans la Société des Nations* (1924); and literature cited in *B.Y.*, 1920-1921, at p. 265; Huber, in Munch, *La Société des Nations*, ii. (1924) pp. 68-136; Waldkirch, *Die dauernde Neutralität der Schweiz* (1926); Morel, *La neutralité de la Suisse et la Société des Nations* (1931); Weber, *Die Verteidigungspflicht der Mitglieder des Völkerbundes* (1932), pp. 123-175; Borel in *R.G.*, xxvii. (1920) pp. 153-180; Mowat in *B.Y.*, 1923-1924, pp. 90-94; Guggenheim in *Z.ö.R.*, vii. (1927) pp. 266-273; Zahler in *American Political Science Review*, xxx. (1936) pp. 735 et seq.; Kunz in *New York University Law Quarterly Review*, 14 (1937), pp. 289-318; Schindler in *Z.ö.V.*, viii. (1938) pp. 413-444, and in *R.I.*, 3rd ser., xix. (1938) pp. 433-472. So strictly did she interpret her obligations attaching to her status, that in February 1921 her Government declined to afford passage through Swiss territory for an inter-

national police force to be composed of troops to be supplied by several members of the League, which it was proposed to send to Vilna under the authority of the Council of the League for the purpose of superintending the taking of a plebiscite: see Schücking und Wehberg, pp. 633-636.

<sup>2</sup> *Off. J.*, 1938, p. 368. See also *ibid.*, p. 385 for the relevant memorandum of the Swiss Government. And see Morgenthau in *A.J.*, xxxii. (1938) pp. 558-562, and Keppler in *Z.ö.R.*, xviii. (1938) pp. 505-545. For the memorandum submitted by Switzerland to the Council of the League on April 29, 1938, see *Off. J.*, 1938, p. 385. Already in 1935 and 1936, in the course of the application of sanctions against Italy, Switzerland considered that she was not bound to take part in economic sanctions which might endanger her neutrality. See in particular the declaration made before the Assembly on October 10, 1935. See *Off. J.*, Special Suppl., No. 138, p. 106; Waldkirch, *Neutralität und Sanktionen* (1935); Schindler in *Neue Schweizerische Rundschau*, 1935, pp. 449-459; Merkat in *Z.ö.V.*, vi. (1936) pp. 387-398.



*sur la genèse et l'évolution de la notion de neutralité* (1937), pp. 356-388—Borchard in *A.J.*, xxii. (1928) pp. 614-620, and *ibid.*, xxvii. (1933) pp. 293-298—Hudson, *ibid.*, xxii. (1928) pp. 332-338—Hyde, *ibid.*, pp. 266-269; in *Proceedings of the American Academy of Political Science*, xvi. (1935) pp. 3-11; and in *Foreign Affairs* (N.Y.), July 1929, pp. 628-634—Garner in *A.J.*, xxiii. (1929) pp. 363-370, and *ibid.*, xxiv. (1930) pp. 566-570—Brierly in *B.Y.*, 1929, pp. 208-210—Wickersham in *Foreign Affairs* (N.Y.), vii. (1929) pp. 356-371—Myers in *Annals of the American Academy of Political Science*, July 1929, pp. 59-62—Rogers, *ibid.*, pp. 51-54—Boye in *A.J.*, xxiv. (1930) pp. 766-770—Anderson, *ibid.*, pp. 101-105—Le Fur in *Hague Recueil*, 1932 (iii.), pp. 542-547—Fenwick in *A.J.*, xxvi. (1932) pp. 787-789—Jessup, *ibid.*, pp. 789-793—Whitton and Gonsiorowski in *Boycotts and Peace* (ed. by Clark, 1932), pp. 518-525—Moore in *A.J.*, xxvi. (1933) pp. 622-628—Wright, *ibid.*, xxvii. (1933) pp. 57-61, and in *A.S. Proceedings*, 1930, pp. 78 *et seq.*—Coudert in *Proceedings of the American Academy of Political Science*, xvi. (1935) pp. 39-50—Nova, as cited above, p. 505—*International Law Association Report*, 40 (1939), pp. 87-124, 283-305. See also the literature referred to above, §§ 52g and 292a.

Absence  
of Sanc-  
tions in  
the  
Treaty.

§ 292h. Unlike the Covenant of the League of Nations, the General Treaty for the Renunciation of War contains no provisions for the enforcement of its principal obligation.<sup>1</sup> This means, *inter alia*, that, so far as its terms are concerned, the Treaty has not directly affected the law of neutrality. It has not imposed upon the signatories the obligation to abandon all or some duties of neutrality to the disadvantage of the State breaking the Treaty. Neither has it conferred upon them the right to modify the laws of neutrality in that direction. For war waged in violation of the Treaty is nevertheless war conferring upon the guilty and innocent belligerents alike all the rights flowing from the accepted law of war and neutrality.<sup>2</sup> Accordingly, the guilty belligerent is entitled to expect that the other signatories of the Treaty will, if they elect to remain neutral, treat him in accordance with the canons of impartiality. There is no doubt that by destroying the basis of the traditional doctrine of neutrality as an attitude of absolute impartiality, namely, the unrestricted right of sovereign States to go to war, the Treaty has provided the starting-point for important changes in the law of neutrality. These changes, however, must be effected by common action of States themselves, and not by jurists engaged in drawing logical consequences

<sup>1</sup> See above, § 61.

<sup>2</sup> See above, § 52j.

from the Treaty.<sup>1</sup> Neither can they be brought about by unilateral action of any single State.<sup>2</sup>

§ 292*i*. While no right to discriminate against the guilty belligerent in disregard of the accepted rules of neutrality can be deduced from the terms of the Treaty, it is arguable that such discrimination may be resorted to in pursuance of a measure of reprisals. Under the legal régime established by the Treaty, the outbreak of war is no longer an event concerning the belligerents only; its bearing upon third States is not limited to producing automatically a relation of neutrality pure and simple. For, as a rule, the outbreak of war will be due to a violation of the Treaty on the part of at least one belligerent. The guilty belligerent, by breaking the Treaty, violates the rights of all other signatories, who, by way of reprisals, may choose to subject him to measures of discrimination, for instance, either by actively prohibiting some or all exports into his territory or merely

Modifica-  
tions of  
Neu-  
trality by  
Means of  
Reprisals.

<sup>1</sup> But see Stimson in *Foreign Affairs* (N.Y.), ii., Special Suppl., No. 1, p. iv.

No authorisation to disregard the duties of neutral impartiality against the State breaking the Treaty can be deduced from the passage in the Preamble which lays down that 'any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty.' The benefits furnished by the Treaty are immunity from war waged as an instrument of national policy, not a guarantee of the observance of rules of International Law, including the rules of neutrality. But see Wright in *A.J.*, xxvii. (1933) p. 59.

<sup>2</sup> It would appear, therefore, that unilateral declarations by one or more countries announcing their willingness to participate, actively or by acquiescence in the measures of others, in future action against the violator of the Pact would not in itself give the impress of legality to any such attitude of discrimination. See Hyde in *A.J.*, xxii. (1928) pp. 267-269, and in *Foreign Affairs* (N.Y.), 1929, p. 632; Whitton and Gonsiorowski in *Boycotts and Peace* (1932), pp. 138-140. In May 1933 the representative of the United

States of America at the Disarmament Conference made a declaration to the effect that the United States would be willing to give an undertaking to refrain, in certain circumstances, from any action tending to defeat the collective effort against the aggressor. The undertaking was conditional upon the conclusion of a disarmament convention: see *Documents*, 1933, p. 459. The following facts may be noted as throwing light upon the present attitude of the United States: (a) their signature in 1928 and ratification in 1932 of the Habana Convention on Maritime Neutrality (see above, § 68), which affirmed in emphatic language the neutral duties of impartiality; (b) their adherence in 1934 to the Anti-War Treaty of Non-Aggression and Conciliation, which excluded all direct sanction for the violation of the obligation not to resort to war and qualified any action of the non-participants as being undertaken 'in their character of neutrals' (*A.J.*, xxviii. (1934), Suppl., p. 79); (c) the various legislative neutrality enactments since 1934 (see above, p. 502) in which no account is taken of the contingency that one of the belligerents may be waging the war in violation of the Pact.

by submitting passively to otherwise unlawful measures on the part of the innocent belligerent. In view of the gravity of the offence giving rise to their application, there ought to be no doubt that reprisals of this nature, however drastic, can be squared with the requirement of proportionality which in International Law conditions the legitimacy of their use.<sup>1</sup> But recourse to them would suggest that the Treaty as such has not altered the law of neutrality.<sup>2</sup> The reaction of the United States and of other signatories of the Treaty to its frequent violations has shown that there is, at present, no general recognition of a legal duty to enforce it in this or in any other way.

### III

#### CHARACTERISTICS OF NEUTRALITY

Grotius, iii. c. 17, § 3—Bynkershoek, *Quaestiones Juris publici*, i. c. 9—Vattel, iii. §§ 193-104—Hall, §§ 19-20—Lawrence, § 222—Westlake, ii. pp. 190-198—Phillimore, iii. §§ 136-137—Hershey, No. 447—Halleck, ii. pp. 161-162—Taylor, § 614—Moore, vii. §§ 1287-1291—Walker, § 54—Holland, *Lectures*, pp. 401-406—Wheaton, § 412—Bluntschli, §§ 742-744—Heffter, § 144—Geffcken in *Holtzendorff*, iv. pp. 605-606—Gareis, § 87—Liszt, § 66—Ullmann, § 190—Fauchille, §§ 1441, 1442—Despagnet, No. 686—Rivier, ii. pp. 368-370—Pradier-Fodéré, viii. Nos. 3222-3224, 3232-3233—Nys, iii. pp. 547-559—Calvo, iv. §§ 2491-2493—Fiore, iii. Nos. 1536-1541, and *Code*, Nos. 1791-1798—Martens, ii. § 129—Dupuis, No. 316—Mérignhac, iii\*. pp. 496-509—Pillet, pp. 273-275—Heilborn, *System*, pp. 336-351—Perales, § 38—Testa, pp. 167-172—Kleen, i. §§ 1-4—Hautefeuille, i. pp. 195-200—Gessner, pp. 22-23—Rolin, §§ 931-934, 952-955—Cruchaga, §§ 1163-1173—Gemma, pp. 361-364—Balladore Pallieri, pp. 389-408—Kunz, pp. 212-224—Genet, §§ 371-372, 385-392, 398-399—Wijnveld, pp. 14-36—Schopfer, *Le principe juridique de la neutralité et son évolution dans l'histoire de la guerre* (1894)—Lifschütz in *Z.I.*, xxvii. (1918) pp. 40-124—Hammarškold in *Bibl. Viser.*, iii. (1924) pp. 55-67.

Concep-  
tion of  
Neu-  
trality.

§ 293. Such States as do not take part in a war between other States are neutrals.<sup>3</sup> The term 'neutrality' is derived from the Latin *neuter*. Neutrality may be defined as the

<sup>1</sup> See above, § 39.

<sup>2</sup> It may well be regarded as controversial whether reprisals are an adequate instrument for enforcing a treaty which its signatories represented to be of fundamental importance in the relations of States, and which, given their sincere determina-

tion to treat it as such, can be properly implemented by the accepted methods of express international agreement. See above, § 52*n*, as to the sanctions of the Treaty.

<sup>3</sup> Grotius (iii. c. 17) calls them *medii in bello*; Bynkershoek (i. c. 9), *non hostes qui neutrarum partium sunt*.

attitude of impartiality adopted by third States towards belligerents and recognised by belligerents, such attitude creating rights and duties between the impartial States and the belligerents. Whether or not a third State will adopt an attitude of impartiality at the outbreak of war is not a matter for International Law but for International Politics. Therefore, unless a previous treaty stipulates it expressly, no duty exists for a State, according to International Law, to remain neutral when war breaks out. Every sovereign State, as an independent member of the Family of Nations, is master of its own resolutions, and the question of remaining neutral or not at the outbreak of war is, in the absence of a treaty stipulating otherwise, one of policy and not of law.<sup>1</sup> However, all States which do not expressly declare the contrary by word or action are supposed to be neutral, and the rights and duties arising from neutrality come into existence, and remain in existence, through the mere fact of a State taking up an attitude of impartiality, and not being drawn into the war by the belligerents. A special assertion of intention to remain neutral is not, therefore, legally necessary on the part of neutral States, although they often expressly and formally proclaim<sup>2</sup> their neutrality.

<sup>1</sup> It should, however, be noted that, side by side with the revival (or attempts at revival) of the conception of *bellum iustum* (see above, § 61 (n.)), the duty of neutral States to intervene 'as the representatives of the legal conscience of the world' in certain cases was once more stressed by many writers after the World War: see, for instance, Fauchille, No. 1444 (1); Rolin, *Du droit à la neutralité ou du droit de rester neutre, et Grotius et Vattel*, Bulletin de la classe des lettres de l'Académie royale, 1920, pp. 181-404; Lorimer (ii. p. 127) and Westlake (ii. p. 191) urged the same before the World War; and Rolin, §§ 931-933. A bibliography on this point and a discussion will be found in Garner, *Developments*, pp. 813-818. And see the literature referred to above, §§ 292a and 292h, on neutrality in relation to the Covenant of the League and the General Treaty for the Renunciation of War. See also above, § 246, as to the neutrality in

relation to violations of rules of warfare by belligerents.

<sup>2</sup> See below, § 309. At the beginning of the war with Germany in 1939, a number of Members of the League informed the Secretary-General of the League of their intention to remain neutral: *Off. J.*, 1939, pp. 389-394. Italy refrained from issuing a declaration of neutrality and announced an attitude of 'non-belligerency' as distinguished from neutrality. It was not claimed that that distinction had legal consequences. In so far as the attitude of non-belligerency prompted the Italian Government or its organs to express sympathy with the cause of one belligerent side, it assumed the complexion of unfriendly rather than illegal conduct in relation to the other belligerents. See below, § 294. As to the obligations of neutrality in the case of undeclared wars see above, § 93 (n.).

Neu-  
trality an  
Attitude  
of Im-  
partiality.

§ 294. Since neutrality is an attitude of impartiality, it excludes such assistance and succour to one of the belligerents as is detrimental to the other, and, further, such injuries to the one as benefit the other. But it requires, on the other hand, active measures from neutral States. For neutrals must prevent belligerents from making use of their neutral territories, and of their resources, for military and naval purposes during the war. This applies not only to actual fighting on neutral territories, but also to the transport of troops, war material, and provisions for the troops, the fitting out of men-of-war and privateers, the establishment of Prize Courts, and the like. Further, neutrals must, by all means falling short of becoming involved in hostilities or of abandoning their attitude of impartiality, prevent each belligerent from interfering with their legitimate intercourse with the other belligerent through commerce and the like, because a belligerent cannot be expected passively to suffer vital damage resulting to himself from the violation by his enemy of a rule, which, while it operates directly in favour of neutrals, indirectly operates in his favour as well.

But it is important to remember that the necessary attitude of impartiality is not incompatible with sympathy with one belligerent, and antipathy against the other, so long as these feelings do not find expression in actions violating impartiality. Thus, not only public opinion<sup>1</sup> and the press of a neutral State, but also its Government,<sup>2</sup> may show their sympathy to one party or another without thereby violating neutrality. Moreover, acts of humanity on the part of neutrals and their subjects, such as the sending to military hospitals of doctors, medicine, provisions, dressing material, and the like, and the sending of clothes and money to prisoners of war, can never be construed as acts of partiality, even if these comforts are provided for the wounded and the prisoners of one belligerent only.

Again, the necessary attitude of impartiality due to the fact that neutrals have nothing to do with quarrels between

<sup>1</sup> See Hyde, ii. § 874.

*tzendorff*, iv. p. 656, who asserts the contrary. And see above, p. 515,

<sup>2</sup> See, however, Geffcken in *Hol-*

n. 2, as to non-belligerency.

the belligerents, does not compel them to remain inactive when a belligerent in carrying on hostilities violates the rules of International Law. On the contrary, as has been pointed out above,<sup>1</sup> neutrals have then a *right* to intervene, although—as the law stands at present—they have no duty to do so.

§ 295. Since neutrality is an attitude during a state of war only, it calls into existence special rights and duties which do not generally obtain. They come into existence through the outbreak of war having been notified, or having otherwise<sup>2</sup> unmistakably become known to third States who take up an attitude of impartiality, and are not dragged into the war by the belligerents; they expire *ipso facto* with the termination of the war, or with the outbreak of war between neutrals and a belligerent.

Neu-  
trality an  
Attitude  
creating  
Rights  
and  
Duties.

Rights and duties derived from neutrality do not exist before the outbreak of war, however imminent it may be. Even a so-called neutralised State, like Switzerland, has during time of peace no duties connected with neutrality, although as a neutralised State it has even then certain duties. These duties are not duties connected with neutrality, but duties imposed upon the neutralised State as a condition of its neutralisation. They include restrictions for the purpose of safeguarding the neutralised State from being drawn into war.<sup>3</sup>

§ 296. International Law is primarily a law between States. For this reason the rights and duties of neutrality are principally those of neutral States as such. In the first instance, neutral States are bound by certain duties of abstention, *e.g.* in respect of supply of loans and munitions to belligerents, which they are not bound to exact from their nationals.<sup>4</sup> Secondly, neutral States are under a duty to prevent their territory from becoming a theatre of war as the result of passage of foreign troops or aircraft or of prolonged stay of belligerent men-of-war in their territorial waters.<sup>5</sup> Thirdly, they are bound to control the activities of their nationals insofar as these may tend

Neu-  
trality  
as an  
Attitude  
of States.

<sup>1</sup> Vol. i. § 135 (4); vol. ii. § 246.

<sup>3</sup> See above, vol. i. § 96, and vol. ii. § 292g.

<sup>2</sup> See Article 2 of Hague Convention III.

<sup>4</sup> See below, §§ 349, 351.

<sup>5</sup> See below, §§ 320 *et seq.*

to transform neutral territory into a basis of war operations or preparations.<sup>1</sup> At the same time, International Law renders unlawful certain activities of nationals of neutral States, like carriage of contraband or breach of blockade, without, however, imposing upon these States the duty to prevent or to penalise such acts. These are punished by the belligerent against whom they are directed.<sup>2</sup>

State  
Control  
over  
Private  
Activities  
and the  
Law of  
Neutrality.

§ 296a. The well-established distinction between the obligations of the neutral State and those of its nationals has been exposed to considerable strain as the result of the extension of the governmental economic activities of some States, as well as in consequence of the rise of communist and totalitarian régimes in which production and trade are

<sup>1</sup> See below, §§ 329 *et seq.*

<sup>2</sup> It is controversial whether the obligations in question are imposed upon individuals by International Law or by the Municipal Law of their own State or of the belligerent. Those who deny that International Law can be binding upon individuals insist on the second alternative. For an emphatic expression of this view see § 296 of the previous editions of this volume. But see below, § 398 (n.) for a survey of authorities favouring the opinion that the carriage of contraband is contrary to International Law. See also Westlake, *Chapters*, p. 1, for a similar view as to breach of blockade. Note also the repeated assertion of British Prize Courts insisting that they administer International Law (see below, § 434). Article 16 of Hague Convention No. V. designates the nationals of a State which is not taking part in a war as neutrals. Again, belligerents occupying enemy territory frequently compel enemy individuals who are not members of the armed forces of the enemy to take a so-called oath of neutrality. See Rolin, § 954. Article 15 of the Habana Convention on Maritime Neutrality of 1928 (see above, § 68) provides that 'of the acts of assistance coming from the neutral States, and the acts of commerce on the part of individuals, only the first are contrary to neutrality.' It is probably true to say that the law of neutrality, far from being

governed by the rigid principle that States only are subject of International Law, shows that individuals may be directly bound by its rules.

From the practical point of view it is of little importance whether the obligations of neutral conduct are considered to bind individuals by virtue of a rule of International Law or of their own Municipal Law. The accurate view is probably that in many cases they are bound by both. In proclamations of neutrality announcing the prohibitions and penalties of Municipal Law, nationals of neutral States are enjoined to refrain from certain activities by virtue both of Municipal Law and the Law of Nations. See, *e.g.*, the British Proclamations of Neutrality in the American Civil War in 1861, *B.F.S.P.*, 51, p. 165; in the Franco-Prussian War in 1870, *ibid.*, 60, p. 437; and in the Spanish-American War in 1898, *ibid.*, 90, p. 344—all of which enjoined British subjects 'to observe a strict neutrality' and 'to abstain from violating or contravening either the laws and statutes of the realm in this behalf, or the law of nations in relation thereto.' The proclamations of numerous other countries are couched in similar terms. See, *e.g.*, the United States Proclamation of Neutrality of September 5, 1939, warning citizens 'of the general tenor of the laws and treaties of the United States in this behalf, and of the law of nations': *International Conciliation*, No. 353 (1939), p. 466.

nationalised or where the State, without itself undertaking responsibilities of this nature, exercises otherwise full control over the activities of its nationals. Where production or trade, or both, are nationalised either generally or in part (as, for instance, where the State takes over the manufacture of arms and munitions), it would appear that as long as direct State management of economic activities has not become a more prominent feature of the practice of States than it is at present, and so long as International Law on the matter has not, in consequence, been altered, countries embarking upon activities of an economic character must abide by the existing rules of International Law which prohibit a neutral State to supply certain goods or to grant loans to either belligerent. Vessels (other than men-of-war) and cargoes of such States are subject to the ordinary incidents of the law of blockade and contraband and of other belligerent rights. This is so for the reason that it is impossible to maintain one set of rules for countries organised on the basis of private enterprise and another for countries where the production of and trade in certain articles is in the hands of the State. Should at any future time the latter practice become general, the existing rule prohibiting the State to do things which it is bound to prevent its nationals from doing would be ripe either for abolition or, possibly, for a modification in the direction of permitting a State thus situated to set up special organisations of a private law character for the purpose of trading with the belligerent subject to the relinquishment, in respect of such goods, of the immunities otherwise enjoyed by the organs and the vessels of a State.<sup>1</sup>

<sup>1</sup> It is clear that a State cannot blow hot and cold at the same time by insisting on the private law character of some of its activities and by claiming the immunities appertaining to the organs of the State. When in October 1939 Soviet Russia protested against certain measures of the British Government in the matter of contraband and search, she declared that her merchant-vessels were State property and for this reason not subject to the ordinary measures of

compulsion applied to privately owned merchant-vessels. See on this question *Harvard Research* (1939), pp. 237-244. In general, while British and American Courts have shown no disposition to deny in time of peace jurisdictional immunities to State vessels engaged in commerce—see above, vol. i, § 451a—this attitude is not conclusive in relation to State-owned ships in the matter of contraband and blockade. See, to the same effect, *Harvard Research* (1939), pp.



From the case of actual governmental responsibility for the production of and trade in certain articles there must be distinguished that of governmental control over exports by the system of licensing and the like.<sup>1</sup> The fact that the Government permits export which it could prevent by means of withholding the licence does not make it a party to the transaction. Its responsibility is engaged only when in thus acting it discriminates between the opposing belligerents. For the same reason the distinction between the duties of the neutral State and its subjects is not necessarily affected by the circumstance that the State exercises over its nationals a degree of control unknown to countries wedded to the principles of individual freedom. Thus the Italian Neutrality Regulations of 1938 forbid the organs of the State to supply munitions or credits to belligerents but allow such activities on the part of private persons.<sup>2</sup> The control exercised by the State becomes a source of international responsibility only when it is used for the purpose of giving the appearance of private activity to State action inconsistent with the obligations of neutrality. This will happen in particular when the individuals in question act as a group or organisation which is in receipt of governmental assistance or which by operation of the law or constitutional provision must be regarded as an organ of the State.

Inter-  
course  
between  
Neutrals  
and Belligerents.

§ 297. Neutrality as an attitude of impartiality involves

217-222. And see above, p. 235, as to the Declaration of Paris. But see Friedmann in *B.Y.*, xix. (1938) pp. 130-137, who argues in favour of the abolition of the existing rule on the ground that it is inequitable to penalise a State because of its economic system by prohibiting it from engaging in trade open to the nationals of other States. The answer is that this disadvantage is slight and exceptional when compared either with what the States in question consider to be the normal advantages of a State-managed economy or with the fact that the abolition of the existing rule would constitute a fundamental change in the existing law of neutrality. At a time when warfare is becoming in-

creasingly mechanised, to permit a neutral State as such to supply the belligerents—which often may, in practice, mean one belligerent only—with vast masses of arms, munitions, and implements of war might amount to rendering its neutrality purely nominal.

<sup>1</sup> During the Italo-Abyssinian War Germany made the export of munitions dependent upon licence and prohibited the export of raw materials which were of importance for German industry. See Freytagh-Loringhoven in *Z.V.*, xx. (1936) pp. 1-13. And see above, pp. 99 and 100, for the literature on the system of licensing.

<sup>2</sup> Article 8: Deák and Jessup, i. p. 726.

the duty of abstaining from assisting either belligerent,<sup>1</sup> whether actively or passively; but it does not involve a duty to break off all intercourse with the belligerents. Apart from certain restrictions necessitated by impartiality, all intercourse between belligerents and neutrals takes place as before, a condition of peace prevailing between them in spite of the war between the belligerents. This applies particularly to the working of treaties, to diplomatic intercourse, and to trade. But indirectly, of course, the condition of war between belligerents may have a disturbing influence upon intercourse between belligerents and neutrals. Thus the treaty rights of a neutral State may be interfered with through occupation of enemy territory by a belligerent; its subjects living on enemy territory bear in a sense enemy character; its subjects trading with the belligerents are hampered by the right of visit and search, and the right of the belligerents to capture blockade-runners and contraband of war.

§ 298. Since neutrality is an attitude during war, the question arises as to the necessary attitude of foreign States towards civil war. As civil war becomes real war through a recognition<sup>1</sup> of the insurgents as a belligerent Power, a distinction must be made between cases where recognition has taken place and those where it has not. There is no doubt that a foreign State commits an international delinquency by assisting insurgents in spite of being at peace with the legitimate Government. But matters are different after recognition. The insurgents are then a belligerent Power, and the civil war is then real war. Foreign States can either become a party to the war or remain neutral, and in the latter case all the duties and rights of neutrality devolve upon them. Since, however, recognition may be granted by foreign States independently of the attitude of the legitimate Government, and since recognition granted by the legitimate Government is not binding upon foreign Governments, it may happen that insurgents are granted recognition by the legitimate Government while foreign

Neutrality in Civil War.

<sup>1</sup> See above, §§ 59 and 76, and Rougier, *Les guerres civiles et le droit des gens* (1903), pp. 414-447.

States refuse it, and *vice versa*.<sup>1</sup> In the first case, namely, recognition of the insurgents by the legitimate Government but not by foreign Governments, the rights and duties of neutrality devolve upon foreign States, as far as the legitimate Government is concerned. Its men-of-war may visit and search their merchantmen for contraband; a blockade declared by it is binding upon them; and the like. But no rights and duties of neutrality devolve upon foreign States as regards the insurgents. A blockade declared by them is not binding, and their men-of-war may not visit and search merchantmen for contraband. On the other hand, if insurgents are recognised by a foreign State but not by the legitimate Government, that foreign State has all the rights and duties of neutrality so far as the insurgents are concerned, but not so far as the legitimate Government is concerned.<sup>2</sup>

Neu-  
trality  
to be  
recog-  
nised by  
the Bel-  
ligerents.

§ 299. Although third States have no duty to remain neutral when war breaks out,<sup>3</sup> and may take up the cause of one of the belligerents, they have a right to demand that neither belligerent should force them into war. A belligerent who, at the outbreak of war, refuses to recognise a third State as a neutral, does not indeed violate neutrality, because neutrality does not come into existence in fact and in law until both belligerents have, expressly or by implication, acquiesced in the attitude of impartiality taken up by third States. However, a belligerent who refuses to recognise a State as neutral violates International Law, although not neutrality.

#### IV

##### DIFFERENT KINDS OF NEUTRALITY

Vattel, iii. §§ 101, 105, 107, 110—Westlake, ii. pp. 206-207—Phillimore, iii. §§ 138-139—Halleck, ii. pp. 162-163—Taylor, § 618—Wheaton, §§ 413-

<sup>1</sup> See above, § 59.

<sup>2</sup> The question whether, if foreign States refuse recognition to insurgents, although the legitimate Government has granted it, the legitimate Government has a right of visit and search

for contraband, is controversial; see *Annuaire*, xviii. pp. 213-216, and Rolin, §§ 209-216. And see §§ 76 and 76a above and § 311a below.

<sup>3</sup> See above, § 293.

425—Bluntschli, §§ 745-748—Geffcken in *Holtzendorff*, iv. pp. 634-636—Ullmann, § 190—Despagnet, Nos. 685, 686—Pradier-Fodéré, viii. Nos. 3225-3231—Rivier, ii. pp. 376-379—Calvo, iv. §§ 2592-2642—Fiore, iii. Nos. 1542-1545—Mérignhac, iii<sup>a</sup>. 509-512—Pillet, pp. 277-284—Kleen, i. §§ 6-22—Hyde, ii. § 875—Fauchille, §§ 1443-1444 (4)—De Louter, ii. pp. 406-415—Cavaglieri in *Rivista*, 2nd ser., vii. (1919) pp. 58-91, 328-362.

§ 300. The very first distinction to be made between different kinds of neutrality is that between perpetual neutrality and other neutrality. Perpetual or permanent neutrality is the neutrality of States which are neutralised by special treaties, as at the present time is Switzerland. Apart from the duties arising from their neutralisation which are to be performed in time of peace as well as in war, the duties and rights of neutrality are the same for them as for other States. This applies not only to the obligation not to assist either belligerent, but also to the obligation to prevent both from using the neutral territory for their military purposes. Thus, Switzerland in 1870 and 1871, during the Franco-German War, properly prevented the transport of troops, recruits, and war material of either belligerent over her territory, disarmed the French army which had saved itself by crossing the Swiss frontier, and detained its members until the conclusion of peace.<sup>1</sup>

§ 301. The next distinction is between general and partial neutrality which derives from the fact that a part of the territory of a State may be neutralised,<sup>2</sup> as are, for instance, the Ionian Islands of Corfu and Paxo, which are part of the territory of Greece. Such a State has a duty always to remain partially neutral—namely, so far as its neutralised part is concerned. General neutrality, on the other hand, is the neutrality of States no part of whose territory is neutralised by treaty.

§ 302. A third distinction is that between voluntary and conventional neutrality. Voluntary (or simple or natural) neutrality is the neutrality of a State which is not bound by a general or special treaty to remain neutral in a certain war. Neutrality is in most cases voluntary. On the other

<sup>1</sup> See below, § 339.

occupation of Corfu by the Allies during the World War see Garner,

<sup>2</sup> See above, § 72. As to the

ii. § 464.

hand, the neutrality of a State by treaty bound to remain neutral in a war is conventional.

Armed  
Neu-  
trality.

§ 303. One speaks of an armed neutrality when a neutral State takes military measures for the purpose of defending its neutrality against possible or probable attempts by either belligerent to make use of the neutral territory. Thus, the neutrality of Switzerland during the Franco-German War was an armed neutrality. So, during the war of 1939, was that of Belgium, who kept her army in a state of permanent mobilisation, and to a large extent of Holland and Switzerland. The term 'armed neutrality' is also used, and in a different sense, when neutral States take military measures for the purpose of defending the real or pretended rights of neutrals against threatened infringements by either belligerent. The First and Second Armed Neutralities<sup>1</sup> of 1780 and 1800 were armed neutralities in the latter sense of the term.

Benevo-  
lent Neu-  
trality.

§ 304. Treaties stipulating neutrality often provide for a 'benevolent' neutrality in a certain war. The term is likewise frequently used during diplomatic negotiations. However, there is now no legal distinction between benevolent neutrality and neutrality pure and simple.<sup>2</sup> The idea dates from earlier times, when the obligations imposed by neutrality were not so stringent, and neutral States could favour one of the belligerents in many ways without thereby violating their neutral attitude. If a State remained neutral in the lax sense in which neutrality was then understood, but otherwise favoured a belligerent, its neutrality was called benevolent.

Perfect  
and Quali-  
fied Neu-  
trality.

§ 305. A distinction of great practical importance in former times was that between perfect, or absolute, and qualified, or imperfect, neutrality. The neutrality of a State was qualified if it remained neutral on the whole, but actively or passively, directly or indirectly, gave some kind of assistance to one of the belligerents in consequence of an obligation entered into by a treaty previous to the war, and

<sup>1</sup> See above, §§ 289, 290.

<sup>2</sup> As to the neutrality of Greece during part of the World War see

below, § 323. As to the Italian declaration of mere non-belligerency (as distinguished from neutrality) in 1939 see above, p. 515, n. 2.

not for that particular war exclusively. On the other hand, neutrality was termed perfect if a neutral State neither actively nor passively, neither directly nor indirectly, favoured either belligerent. There is no doubt that, in the eighteenth century, when it was recognised that a State could be considered neutral, although it was by a previous treaty bound to render more or less limited assistance to one of the belligerents, this distinction between neutrality perfect and qualified was justified.<sup>1</sup> But, during the second half of the nineteenth century, it became controversial whether so-called qualified neutrality was neutrality at all, or whether a State, which, in fulfilment of a treaty obligation, rendered some assistance to one of the belligerents, violated its neutrality. The majority of modern writers<sup>2</sup> maintained (correctly, it is believed) that a State was either neutral or not, and that it violated its neutrality if it rendered any assistance whatever to a belligerent from any motive whatever. In this case, a State which had entered into such obligations as those just mentioned would in time of war frequently have conflicting duties; in fulfilling its treaty obligations, it would frequently be obliged to violate its duty of neutrality, and *vice versa*. Several writers,<sup>3</sup> on the other hand, maintained that such a fulfilment of treaty obligations would not constitute a violation of neutrality. But Article 2 of Hague Convention V. categorically enacts that 'belligerents are forbidden to move across the territory of a neutral Power troops or convoys either of munitions of war or of supplies.'<sup>4</sup> The principle at the back of this enactment no doubt is that a qualified neutrality has no longer any *raison d'être*, and that neutrality must in every case be

<sup>1</sup> See Nys in *R.I.*, 2nd ser., xv. (1913) pp. 173-181.

<sup>2</sup> See, for instance, Ullmann, § 190; Despagnet, No. 686; Rivier, ii. p. 378; Calvo, iv. § 2594; Taylor, § 618; Fiore, iii. No. 1541; Kleen, i. § 21; Hall, § 215 (see also Hall, § 219, concerning passage of troops); Fauchille, § 1444 (3). Phillimore, iii. § 138, agrees with the majority of writers, but in § 139 he thinks that it would be too rigid to consider acts of 'minor' partiality which are the

{ result of conventions previous to the war as violations of neutrality.

<sup>3</sup> See, for instance, Heffter, § 144; Manning, p. 225; Wheaton, §§ 425-427; Bluntschli, § 746; Halleck, ii. p. 162.

<sup>4</sup> Although this prohibition is in terms addressed to belligerents, there can be no doubt that it equally forbids neutrals to consent to such transit: see Scott, *Reports to the Hague Conferences* (1917), p. 539. See also the *Wimbledon*, below, § 323 (n.).

perfect.<sup>1</sup> Prior to the Covenant of the League of Nations and the General Treaty for the Renunciation of War this rejection of qualified neutrality was the necessary corollary of the right, which International Law accorded to every State, to wage war for the defence of its legal rights and the promotion of its political interests. The hardening, in the eighteenth century, of the conception of neutrality in the direction of absolute impartiality was due to the recognition by International Law of the sovereign right of war regardless of its cause. The distinction between just and unjust war was jettisoned, and absolute neutrality was the necessary corollary of that development. There was no room for qualified neutrality when war on both sides was, as a rule, just. With the conclusion of the Covenant and the Treaty for the Renunciation of War the doctrine of absolute neutrality has largely lost its historical foundation. States have not so far drawn all the legal consequences from the situation thus created.<sup>2</sup> But there is no doubt that so long as these very general treaties remain part of International Law, the legal position must be presumed to have undergone a change. The implications of that change are indicated elsewhere.<sup>3</sup>

Some  
Historical  
Examples  
of Quali-  
fied Neu-  
trality.

§ 306. For the purpose of illustration, the following instances of qualified neutrality may be mentioned:

(1) By a Treaty of Amity and Commerce concluded in 1778 between the United States of America and France, the United States granted to French privateers and their prizes the right of admission to American ports during war, and

<sup>1</sup> See above, § 77, where it has been pointed out that a neutral who takes up an attitude of qualified neutrality may nowadays be considered as an accessory belligerent party to the war. Cavaglieri in *Rivista*, 2nd ser., viii. (1919) pp. 328-362, discusses the intermediate case of the actively assisting allies of a belligerent. As regards the other belligerent, they are not neutrals, and, legally, they are not enemies; for instance, Italy declared war on Austria on May 24, 1915, and on Germany on August 27, 1916. In the meantime Germany and Italy

did not observe the duties of neutrality, but they refused, expressly and repeatedly, to recognise that they were at war with each other. Cavaglieri solves the juridical anomaly thus arising by proposing the conception of 'auxiliaries' (*ausiliari*) as an intermediate stage between belligerent and neutral. *Stato alleato di paesi nemici* was the description given to Germany by the Italian Government before the declaration of war; diplomatic relations were broken off long before the declaration of war.

<sup>2</sup> See above, §§ 52n and 292n-292d.

<sup>3</sup> See §§ 292-292d, 306a, and 447a.

undertook not to admit the privateers of the enemies of France. When in 1793, during war between Great Britain and France, Great Britain complained of the admission of French privateers to American ports, the United States met the complaint by advancing their treaty obligations.<sup>1</sup>

(2) Denmark had by several treaties, especially by a treaty of 1781, undertaken to furnish Russia with a certain number of men-of-war and troops. In 1788, during war between Russia and Sweden, Denmark fulfilled her obligations towards Russia, and nevertheless declared herself neutral; although Sweden protested against the possibility of such qualified neutrality, she acquiesced, and did not consider herself at war with Denmark.<sup>2</sup>

(3) In 1848, during war between Germany and Denmark, Great Britain, fulfilling a treaty obligation towards Denmark, prohibited the exportation of arms to Germany, but permitted exportation to Denmark.<sup>3</sup>

(4) In 1900, during the South African War, Portugal, to comply with a treaty obligation<sup>4</sup> towards Great Britain regarding the passage of British troops through Portuguese territory in South Africa, allowed the passage of a British force which had landed at Beira<sup>5</sup> and was destined for Rhodesia.

(5) In 1915, during the World War, British and French troops were landed at Salonika, which was part of the territory of Greece, then neutral, in order to aid Serbia, which was also an ally of Greece. Greece protested, but did not oppose the landing.<sup>6</sup>

(6) In April 1917, Costa Rica offered her ports and waters for the use of the navy of the United States (who at that time had become a belligerent). Guatemala followed suit, and Brazil, Uruguay, Salvador, and Peru<sup>7</sup> expressly modi-

<sup>1</sup> See Wheaton, § 425, and Phillimore, iii. § 139.

<sup>2</sup> See Phillimore, iii. § 140.

<sup>3</sup> See Geffcken in *Holtzendorff*, iv. p. 610, and Rivier, ii. p. 379.

<sup>4</sup> Article 11 of the treaty between Great Britain and Portugal concerning the delimitation of spheres of influence in Africa. Martens, *N.R.G.*, 2nd ser., xviii. p. 185.

<sup>5</sup> See below, § 323; Baty, *International Law in South Africa* (1900), p. 75; and 'The Times' *History of the War in South Africa*, iv. p. 386.

<sup>6</sup> Garner, ii. § 466; and below, § 323.

<sup>7</sup> For the relevant decrees of these countries see *Harvard Research* (1939), pp. 880-883.



fied their neutrality regulations in this direction. Uruguay, for instance, issued a decree announcing that she would refrain from applying the rules of neutrality against any American State engaged, in the defence of its rights, in a war with States in other continents.<sup>1</sup>

Antici-  
patory  
Renuncia-  
tion of  
Impartial  
Treat-  
ment.

§ 306a. Moreover, as has been shown above in the discussion of the Covenant of the League,<sup>2</sup> a State may in a treaty renounce for all or some wars in which it may be engaged in the future, the right to impartial treatment on the part of the neutral. This means that it may authorise the neutral to adopt an attitude of qualified neutrality by discriminating against it to the extent specified in the treaty. Thus members of the League must be presumed to have agreed in Article 16 of the Covenant that should they resort to war in breach of the obligations of the Covenant, other members of the League shall be entitled to discriminate against them to the extent of applying the economic sanctions enumerated therein and granting the right of passage to the forces of any of the members of the League co-operating to protect the Covenant. And it has been suggested that similar agreements may be concluded by States which are not members of the League but which, being parties to the General Treaty for the Renunciation of War, are desirous of being put unequivocally in a position to discriminate against the belligerent who has resorted to war in violation of the Treaty.<sup>3</sup> There is nothing in the existing principles of the law of neutrality which is inconsistent with agreements of this nature.

## V

### COMMENCEMENT AND END OF NEUTRALITY

Hall, § 207—Westlake, ii. pp. 208-210—Phillimore, i. §§ 392-392\*, iii. §§ 146-149—Taylor, §§ 610-611—Wheaton, §§ 437-439, and Dana's note, 215—Heffter, § 145—Despagnet, No. 689—Pradier-Fodéré, viii. Nos. 3234-3237—Rivier, ii. pp. 379-381—Martens, ii. § 138—Kleen, i. §§ 5, 36-42—Fauchille, §§ 1445-1446 (3)—Rolin, §§ 956-960—Hatschek, pp. 362-363—Cruchaga, § 1174—Suarez, §§ 501, 518—Hyde, ii. §§ 876-879.

<sup>1</sup> For details see Hyde, ii. pp. 765, 766.

<sup>2</sup> §§ 292a-292e.

<sup>3</sup> See § 292h (n.).

§ 307. Since neutrality is an attitude of impartiality deliberately taken up by a State and acquiesced in by the belligerents, it cannot begin before the outbreak of war becomes known. It is only then that third States can make up their minds whether or not they intend to remain neutral. As soon as they determine to adopt an attitude of impartiality, and the belligerents acquiesce in their choice, the duties deriving from neutrality are incumbent upon them. It has long been the usual practice of belligerents to notify the outbreak of war to third States so as to enable them to make their decision, but formerly this was not in strict law necessary. Knowledge of the outbreak of war, however obtained, gave a third State an opportunity of coming to a decision, and, if it remained neutral, its neutrality dated from the time when it first knew of the outbreak of war. But it is apparent that an immediate notification of war by belligerents is of great importance, as excluding all doubt and controversy regarding knowledge of the outbreak of war. For it must always be remembered that a neutral State may in no way be made responsible for acts of its own or of its subjects which have been performed before it knew of the war, although the outbreak of war might have been expected. For this reason Article 2 of Hague Convention III. enacted that belligerents must without delay send a notification of the outbreak of war<sup>1</sup> to neutral Powers, and that the condition of war should not take effect in regard to neutral Powers until after receipt of a notification, unless it was established beyond doubt that they were in fact aware of its outbreak.<sup>2</sup>

§ 308. As civil war becomes real war through recognition of the insurgents as a belligerent Power, neutrality during a civil war begins for every foreign State from the moment recognition is granted.<sup>3</sup>

§ 309. Neutrality being an attitude of States creating rights and duties, active measures on the part of a neutral State are required for the purpose of preventing its officials

<sup>1</sup> It may even be made by telegraph.

<sup>2</sup> See above, §§ 94, 95.

<sup>3</sup> That recognition may be granted

or refused by foreign States independently of the attitude of the legitimate Government has been stated above, § 298.

and subjects from committing acts incompatible with its duty of impartiality. The pronouncement by which a neutral State orders its organs and subjects to comply with the attitude of impartiality adopted by itself is called a 'declaration of neutrality' in the special sense of the term. Such a declaration must not, however, be confounded with manifestoes by the belligerents proclaiming to neutrals the rights and duties devolving upon them through neutrality, or with the assertions made by neutrals to belligerents or *urbi et orbi* that they will remain neutral, although such pronouncements and assertions are often also called declarations of neutrality.<sup>1</sup>

Municipal  
Neutrality  
Laws.

§ 310. International Law leaves it to the discretion of each State to take the measures necessary to ensure neutrality. Since in constitutional States the powers of Governments are frequently so limited by Municipal Law that they may not take adequate measures without the consent of their parliaments, and since, so far as International Law is concerned, it is no excuse for a Government to plead that its Municipal Law prevents it from taking adequate measures,<sup>2</sup> several States have once for all enacted so-called Neutrality Laws, which prescribe the attitude to be taken up by their officials and subjects in case they remain neutral in a war. These Neutrality Laws are latent in time of peace; but their provisions become operative *ipso facto* by the respective States making a declaration of neutrality to their officials and subjects.<sup>3</sup>

British  
Foreign  
Enlist-  
ment Act.

§ 311. The United States of America enacted<sup>4</sup> a Neutral-

<sup>1</sup> See above, § 293. In the Cuban Declaration of Neutrality of September 1, 1939, it was stated, incorrectly, that 'the universal principles of International Law impose upon non-belligerent States the obligation of declaring their neutrality.' On the outbreak of the war in Europe in 1939 a number of States, including Japan, Hungary, Greece, and Bulgaria, refrained from issuing a proclamation of neutrality.

<sup>2</sup> See the *Alabama* case, below, § 335.

<sup>3</sup> See Deák and Jessup, *A Collection of Neutrality Laws, Regulations and*

*Treaties of Various Countries*, 2 vols. (1939)—an indispensable instrument of study.

<sup>4</sup> Printed in Phillimore, i. pp. 667-672. On the resolution of Congress of March 4, 1915, see *A.J.*, ix. (1915) pp. 490-493. See also the Act 'to punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, etc.', passed on June 15, 1917 (*A.J.*, xi. (1917), Suppl. pp. 178-198). As to the United States neutrality proclamation and legislation in 1939 see above, p. 502. On the declarations of neutrality by

ity Law on April 20, 1818; Great Britain followed her example in 1819 by passing a Foreign Enlistment Act,<sup>1</sup> which was in force till 1870. As this Act did not give adequate powers to the Government, Parliament passed on August 9, 1870, a new Foreign Enlistment Act,<sup>2</sup> which is still in force. This Act, in the event of British neutrality, prohibits: (1) the enlistment by a British subject in the military or naval service of either belligerent,<sup>3</sup> and similar acts (§§ 4-7); (2) the building, equipping,<sup>4</sup> and despatching<sup>5</sup> of vessels for employment in the military or naval service

other States in the World War see Fauchille, § 1446 (1), n. 3; Deák and Jessup, *passim*. For the Belgian and Dutch neutrality proclamations in 1939 see *R.I.*, 3rd ser., xx. (1939) pp. 582-593; for those of the Scandinavian countries see *Acta Scandinavica*, x. (1939) pp. 142-144; of the principal Latin-American States see *Bulletin de l'Institut Juridique International*, 42 (1940), pp. 110 *et seq.*; Deák and Jessup (Supplement, 1940). As to the notifications to the League of Nations see above, p. 515.

<sup>1</sup> 59 Geo. III. c. 69.

<sup>2</sup> 33 & 34 Vict. c. 90. See Sibley in the *Law Magazine and Review*, xxix. (1904) pp. 454-467, and xxx. (1905) pp. 37-53.

<sup>3</sup> 'Without the licence' of the Crown: In 1835 British subjects were permitted to enlist in a Spanish Legion for the purpose of assisting the Queen of Spain in pursuance of the Quadruple Alliance Treaty. In 1940 permission was granted to British subjects to enlist with the Finnish forces fighting against Russia. See above, p. 507.

<sup>4</sup> These sections are not confined to time of war: see *The Harrier* (1921) 8 Ll.L.R. 488 and *R. v. Sandoval*, 3 T.L.R. 411. According to § 30, the interpretation clause of the Act, 'equipping' includes 'the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service.' It is, therefore, not lawful for British ships, in case Great Britain is neutral,

to supply a belligerent fleet direct with coal. Thus during the Russo-Japanese War, while German steamers laden with coal followed the Russian fleet on her journey to the Far East, British shipowners were prevented from doing the same by the Foreign Enlistment Act. It was under this Act that in 1904 the British Government ordered the detention of the German steamer *Captain W. Menzel*, which had taken on board Welsh coal at Cardiff for the purpose of carrying it to the Russian fleet *en route* to the Far East. See below, § 350.

<sup>5</sup> An interesting case occurred during the Russo-Japanese War. Messrs. Yarrow & Co., the shipbuilders, possessed a partly completed vessel, the *Caroline*, capable of being finally fitted up either as a yacht or as a torpedo-boat. In September 1904 a Mr. Sinnet and the Hon. James Burke Roche called at their shipbuilding yard, bought the *Caroline*, and ordered her to be fitted up as a high-speed yacht. The required additions were finished on October 3. On October 6 the vessel left Messrs. Yarrow's yard and was navigated by a Captain Ryder, via Hamburg, to the Russian port of Libau, there to be altered into a torpedo-boat. That § 8 of the Foreign Enlistment Act applied to this case there is no doubt. But there is also no doubt that it was this Act, and not the rules of International Law, which required the prosecution of Messrs. Sinnet and Roche by the British Government. For, in International Law, the case was merely one of contraband. See below, §§ 321, 334, 397.

of either belligerent (§§ 8-9) ; (3) the increase by any person on British territory of the armament of a man-of-war of either belligerent being at the time in a British port (§ 10) ; (4) the preparing or fitting out of a naval or military expedition against a friendly State (§ 11).<sup>1</sup>

The British Foreign Enlistment Act goes beyond the requirements of International Law, in so far as it prohibits and penalises a number of acts which, according to the present rules of International Law, a neutral State is not required to prohibit and penalise. Thus, for instance, a neutral State need not prohibit its private subjects from enlisting in the service of a belligerent ; from supplying coal, provisions, arms, and ammunition direct to a belligerent fleet, provided that the fleet is not within, or just outside, the territorial waters of that neutral ; or from selling ships to a belligerent, although it is known that they will be converted into cruisers, or used as transport ships. For Article 7 of Convention V. and Article 7 of Convention XIII. categorically enact that ' a neutral Power is not bound to prevent the export or transit, on behalf of either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet.' <sup>2</sup>

Municipal  
Neutrality  
Laws  
in Case of  
Insur-  
gency.

§ 311a. Although recognition of belligerency alone brings about the operation of rules of neutrality as between the parties to the civil war and foreign States, the application of municipal neutrality laws is independent of such recognition. Both the United States neutrality laws and the British Foreign Enlistment Act of 1870 have on occasions been declared enforceable in cases of mere insurgency in which recognition of belligerency was refused.<sup>3</sup> Thus in June 1895 the President of the United States issued a proclamation declaring that Cuba was the seat of civil disturbances and admonishing all persons within the jurisdiction of the United States to refrain from acts prohibited by the neutrality

<sup>1</sup> The Jameson Raiders were convicted under this section: *Reg. v. Jameson and Others* [1896] 2 Q.B. 425 ; Pitt Cobbett, *Leading Cases*, ii. p. 500 ; Halleck, ii. p. 195 (n.), and *Law Magazine and Review*, xxi. (1896) pp. 141-143, 264.

<sup>2</sup> As to the drastic provisions of the United States Neutrality Laws of 1935, 1937, and 1939 see above, p. 502.

<sup>3</sup> As to recognition of insurgency see vol. i. § 75g.

laws.<sup>1</sup> During the Spanish Civil War a warning was issued by the British Government in January 1937 to the effect that persons enlisting in the service of either side to the civil war would be contravening the Foreign Enlistment Act.<sup>2</sup>

§ 312. Neutrality ends with the cessation of war, or through a hitherto neutral State beginning war against one of the belligerents, or through one of the belligerents commencing war against a hitherto neutral State. But two classes of cases must be distinguished. End of  
Neutrality.

There is, in the first place, the class of cases in which war breaks out between one of the belligerents and a hitherto neutral State, either (a) on account of a dispute not connected with the cause of the war then in progress, or (b) because the belligerent has violated fundamental rules of warfare, or (c) because either the belligerent or the neutral has committed a violation of neutrality so grave that the injured party considers it necessary to answer it by a declaration of war. In such and similar cases a declaration of war does not *ipso facto* constitute a violation of neutrality.

There is, secondly, the class of cases in which war breaks out between one of the belligerents and a hitherto neutral State simply because it does not suit the belligerent any longer to recognise its impartial attitude, or because it does not suit the neutral to remain neutral any longer. In such cases a declaration of war *ipso facto* constitutes a violation of neutrality because, neutrality having previously come into existence in fact and in law, a neutral ought not, subject to his obligations as a member of the League of Nations, to abandon it except for a reason not connected with the cause of the war in progress, nor ought a belligerent to draw the neutral into the war.<sup>3</sup>

<sup>1</sup> *U.S. For. Rel.*, 1895, ii. 1195. The Proclamation was fully acted upon in *The Three Friends* (1897), 166 U.S. 63.

<sup>2</sup> The effect of the interpretative Section 30 of that Act is to assimilate insurgents, whether recognised as belligerents or not, to a foreign 'State' in the meaning of the Act. The question whether there was 'war' in the meaning of the Act was correctly

answered to the effect that the operation of the Act was not conditional upon the existence of war in its technical meaning. This is so, although Section 11 seems to be the only Section of that Act so worded as clearly to apply to cases in which there is no formal war in progress. See McNair in *Law Quarterly Review*, liii. (1937) pp. 494-496.

<sup>3</sup> See above, § 299.

However this may be, duties of neutrality exist only so long as a State remains neutral. They come to an end *ipso facto* by a neutral State throwing up its neutrality, or by a belligerent beginning war against a hitherto neutral State. Yet the ending of neutrality must not be confounded with mere violation of neutrality. A mere violation does not *ipso facto* bring neutrality to an end.<sup>1</sup>

Changes  
of Neu-  
trality  
Regula-  
tions  
during the  
War.

§ 312a. In the course of a war a neutral State may find it necessary to change its existing neutrality legislation for the better protection of its interests as a neutral or otherwise, or with a view to a more adequate fulfilment of its obligations of neutrality.<sup>2</sup> Thus, for instance, during the World War some States found it desirable to expand their neutrality legislation in order to cope with the new problems which arose as the result of the developments in radio-telegraphy and submarine warfare.<sup>3</sup> So long as such changes are made applicable, in principle, to both belligerents, the neutral is, under International Law, free to adopt them at his discretion. This is indirectly recognised in the Preamble to Hague Convention No. XIII., which lays down that rules of neutrality should not be changed in the course of the war 'except in a case where experience has shown the necessity for such a change for the protection of the rights' of the neutral States.<sup>4</sup> Such rights include the interest of the neutral in the proper fulfilment of his international duties.<sup>5</sup>

<sup>1</sup> See below, § 358.

<sup>2</sup> For a survey of the practice of States, which fully confirms that view, see *Harvard Research* (1939), pp. 316-329. See also Eagleton in *A.J.*, xxxiv. (1940) pp. 99-104.

<sup>3</sup> In particular, a number of States issued regulations forbidding the use of radio on belligerent vessels within their national waters; see below, § 356. Others prohibited the entry of belligerent submarines into their territorial waters; see below, § 344a.

<sup>4</sup> Chile relied on these provisions

of the Preamble when in December 1914 she decided that belligerent war-vessels should not be permitted to take a quantity of coal exceeding the amount necessary for reaching the first coaling station of a neighbouring country: Deák and Jessup, i. p. 360.

<sup>5</sup> In November 1939, i.e. two months after the outbreak of the war with Germany, the United States modified certain features of their exceptional neutrality legislation in the direction of a closer approximation to the accepted notions of neutral rights and obligations. See above, § 292a.

# CHAPTER II

## RELATIONS BETWEEN BELLIGERENTS AND NEUTRALS

### I

#### RIGHTS AND DUTIES DERIVING FROM NEUTRALITY

Vattel, iii. § 104—Hall, § 214—Phillimore, iii. §§ 136-138—Twiss, ii. § 216—Halleck, ii. pp. 161-209—Heffter, § 146—Geffcken in *Holtzendorff*, iv. pp. 656-657—Gareis, § 88—Ullmann, § 191—Despagnet, Nos. 684 and 690—Rivier, ii. pp. 381-385—Nys, iii. pp. 560-625—Calvo, iv. §§ 2491-2493—Fiore, iii. Nos. 1501, 1536-1540, and *Code*, Nos. 1799-1801, 1807—Martens, ii. § 131—Kleen, i. §§ 45-46—Mérignhac, iii<sup>a</sup>. pp. 512-516—Pillet, pp. 273-275—Suarez, §§ 504-505—Rolin, §§ 961-979, 983-991—Hyde, ii. §§ 848, 849—Spaight, *Air*, pp. 382-409, 421-465—*Harvard Research* (1939), pp. 245-249.

§ 313. Neutrality can be carried out only if neutrals as well as belligerents follow a certain line of conduct in their relations with one another. It is for this reason that from neutrality derive rights and duties, for belligerents as well as for neutrals, and that, consequently, neutrality can be violated by both belligerents and neutrals. These rights and duties are correlative—the duties of neutrals to the rights of belligerents, and the duties of belligerents to the rights of neutrals.

Conduct  
in general  
of Neu-  
trals and  
Belliger-  
ents. ✓

§ 314. There are two rights and two duties deriving from neutrality for neutrals, and likewise two for belligerents.

The  
Rights  
and  
Duties of  
Neutrals  
and of  
Belliger-  
ents.

Duties of neutrals are, in the first place, to act towards belligerents in accordance with their attitude of impartiality ; and, secondly, to acquiesce in the exercise by either belligerent of the right to punish neutral merchantmen for breach or attempted breach of blockade, carriage of contraband, or rendering unneutral service to the enemy, and, accordingly, to visit, search, and eventually capture them.

The duties of belligerents are, in the first place, to act



towards neutrals in accordance with their attitude of impartiality ; and, secondly, not to suppress their intercourse, and in particular their commerce, with the enemy.

Either belligerent has a right to demand impartiality from neutrals ; on the other hand, neutrals have a right to demand such behaviour from each belligerent as is in accordance with their attitude of impartiality. Neutrals have a right to demand that their intercourse, and in particular their commerce, with the enemy shall not be suppressed ; on the other hand, each belligerent has a right to punish subjects of neutrals for breach of blockade, carriage of contraband, and unneutral service, and, accordingly, to visit, search, and capture neutral merchantmen.

Rights  
and  
Duties of  
Neutrals  
con-  
trasted.

§ 315. Some writers<sup>1</sup> maintain that no rights derive from neutrality for neutrals, and, consequently, no duties for belligerents, because everything which must be left undone by a belligerent regarding his relations with a neutral must likewise be left undone in time of peace. But this opinion has no foundation. It is true, indeed, that the majority of the acts which belligerents must leave undone in consequence of their duty to respect neutrality must likewise be left undone in time of peace in consequence of the territorial supremacy of every State. But there are several acts which do not belong to this class—for instance, the non-appropriation of enemy goods on neutral vessels. And those acts which do belong to this class also fall at the same time under another category. Thus, a violation of neutral territory by a belligerent for military and naval purposes of the war is indeed an act prohibited in time of peace, because every State has to respect the territorial supremacy of other States ; but it is at the same time a violation of neutrality, and therefore totally different from other violations of foreign territorial supremacy. While every State has a right to demand reparation for an ordinary violation of its territorial supremacy, it need not take any notice of it, and it has no duty to demand reparation. But in case a violation of its territorial supremacy constitutes at the same time a violation of its neutrality, the neutral State not only has a

<sup>1</sup> Heffter, § 149 ; Gareis, § 88 ; Heilborn, *System*, p. 341.

right to demand reparation, but has a duty<sup>1</sup> to do so. For, if it did not, it would violate its duty of impartiality by favouring one belligerent to the detriment of the other.<sup>2</sup>

§ 316. It has already been stated above<sup>3</sup> that impartiality *excludes* such assistance and succour to one of the belligerents as is detrimental to the other, and, further, such injuries to one of the belligerents as benefit the other, and that it *includes* active measures on the part of a neutral for the purpose of preventing belligerents from making use of neutral territories and neutral resources for their military and naval purposes, and of preventing either of them from interfering with his legitimate intercourse with the other. But all this does not exhaust the contents of the duty of impartiality.

Duty  
of Impar-  
tiality.

For, according to the present strict conception of neutrality, the duty of impartiality *excludes* in addition all facilities whatever for military and naval operations of the belligerents, even if granted to both belligerents alike. In former times assistance was not considered a violation of neutrality, provided it was given to both belligerents in the same way, and States were considered neutral although they allowed an equal number of their troops to fight on the side of each belligerent. To-day this could no longer happen. From Hague Conventions V. and XIII., which deal with neutrality in land and sea warfare respectively, it becomes quite apparent that any facility whatever directly concerning military or naval operations, even if it consists only in granting passage over neutral territory to belligerent forces, is illegal, although granted to both belligerents alike. The duty of impartiality to-day comprises abstention from any active or passive co-operation with belligerents.

Secondly, the duty of impartiality *includes* in addition the equal treatment of both belligerents regarding such

<sup>1</sup> See, for instance, Article 3 of Hague Convention XIII., which enacts: 'When a ship has been captured in the territorial waters of a neutral Power, such Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and

crew, and to intern the prize crew. If the prize is not within the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.'

<sup>2</sup> See below, § 360.

<sup>3</sup> § 294.

facilities as do not directly concern military or naval operations, and which may, therefore, be granted or refused to belligerents according to the discretion of a neutral. If a neutral grants such facilities to one belligerent, he must grant them to the other in the same degree. If he refuses them to the one, he must likewise refuse them to the other.<sup>1</sup> Thus, since it is not a violation of neutrality for a neutral to allow his subjects to supply either belligerent with arms and ammunition in the ordinary way of trade, it would, apart from the obligations of the Covenant of the League of Nations, constitute a violation of neutrality to prohibit the export of arms destined for one of the belligerents only. Thus, further, if a neutral allows men-of-war of one of the belligerents to bring their prizes into neutral ports, he must grant the same facility to the other belligerent.

Duty of  
Impartial-  
ality  
before and  
after the  
World  
War.

§ 317. Although neutrality has already for centuries been recognised as an attitude of impartiality, it has taken two hundred years for the duty of impartiality to attain its present range and intensity. This continuous development had by no means ceased, but was slowly and gradually going on, when the World War broke out. The manner in which, after the World War, it has been affected by the Covenant of the League, the General Treaty for the Renunciation of War, and the advent of totalitarian and dictatorial régimes, has been indicated above.<sup>2</sup>

Duty of  
Belli-  
gerents  
to treat  
Neutrals  
in accord-  
ance with  
their Im-  
partiality.

§ 318. The contents of the duty of belligerents to treat neutrals in accordance with their impartiality are so manifest that elaborate treatment is unnecessary. This duty *excludes*, in the first place, any violation of neutral territory for military or naval purposes of the war,<sup>3</sup> and any interference with the legitimate intercourse of neutrals with the enemy; and, secondly, the appropriation of neutral goods, contraband excepted, on enemy vessels.<sup>4</sup> On the other hand, it *includes*, in the first place, due treatment of neutral diplomatic envoys accredited to the enemy and found on occupied

<sup>1</sup> See Articles 7, 8, 9, 11, 13, 14 of Hague Convention V., and Articles 7, 9, 11, 17, 19, 21, 23 of Hague Convention XIII.

<sup>2</sup> See above, §§ 292a-292i, 296a.

<sup>3</sup> See Articles 1-4 of Hague Convention V., and Articles 1-5 of Hague Convention XIII.

<sup>4</sup> This is stipulated by the Declaration of Paris of 1856.

enemy territory ; and, secondly, due treatment of neutral subjects and neutral property on enemy territory. A belligerent who conquers enemy territory must at least grant to neutral envoys accredited to the enemy the right to quit the occupied territory unmolested.<sup>1</sup> He must likewise abstain from treating neutral subjects and property established on enemy territory more harshly than the laws of war allow ; for, although neutral subjects and property, by being established on enemy territory, have acquired enemy character, nevertheless they have not lost the protection of their neutral home State.<sup>2</sup> He must, lastly, pay full damages in case he exercises his right of angary<sup>3</sup> against neutral property in course of transit through enemy territory.

§ 319. The duty of each belligerent not to suppress inter-  
course between neutrals and the enemy requires no detailed  
discussion either. It is a duty which is in accordance with  
the development of the institution of neutrality. It is of  
special importance with regard to commerce of subjects of  
neutrals with belligerents, since formerly attempts were  
frequently made to intercept all neutral trade with the  
enemy although no effective blockade had been established.  
A consequence of the now recognised freedom of neutral  
commerce with either belligerent is, in the first place, the  
rule enacted by the Declaration of Paris of 1856, that enemy  
goods, with the exception of contraband, on neutral vessels  
on the open sea or in enemy territorial waters may not be  
appropriated by a belligerent,<sup>4</sup> and, secondly, the rule,  
enacted by Article 1 of Hague Convention XI., that the  
postal correspondence of neutrals or belligerents, except  
correspondence destined for, or proceeding from, a blockaded  
port, which may be found on a neutral or enemy vessel at

Contents  
of Duty  
not to  
suppress  
Inter-  
course  
between  
Neutrals  
and the  
Enemy.

<sup>1</sup> The position of foreign envoys found by a belligerent on occupied enemy territory is not settled as regards details. But there is no doubt that a certain consideration is due to them, and that they must at least be granted the right to depart. See above, vol. i. § 399. See also Hurst in *Hague Recueil*, 1926 (ii.), pp. 232, 233.

<sup>2</sup> See above, § 88. See also Eagle-

ton in *A.S. Proceedings*, 1938, pp. 129-140, and *Harvard Research* (1939), pp. 359-391, on requisitioning of neutral property and neutral losses incidental to war operations. See also p. 87 and p. 348 (n.) on the Swiss claims in respect of losses of Swiss subjects during the World War.

<sup>3</sup> See below, §§ 364-367.

<sup>4</sup> See above, § 177 (n.).

sea, is inviolable.<sup>1</sup> But the recognised freedom of neutral commerce necessitates, on the other hand, certain measures on the part of belligerents. It would be unreasonable to impose on a belligerent a duty not to prevent the subjects of neutrals from breaking a blockade, from carrying contraband, and, lastly, from rendering unneutral service to the enemy. International Law gives, therefore, a right to either belligerent to prevent neutral merchantmen, so far as is in his power, from doing such things, and, accordingly, to visit, search, capture, and confiscate them.

But the duty of a belligerent not to suppress intercourse, and especially legitimate commerce, between neutrals and the enemy has an exception in the case of reprisals. It has been pointed out above<sup>2</sup> that neutrals are under a duty to resist unlawful interference, by either belligerent, with their legitimate intercourse with the other belligerent; for a belligerent cannot be expected to submit passively to vital damage to himself in consequence of the violation by his enemy of a rule which, although it operates directly in favour of neutrals, indirectly operates in his favour also. If, therefore, the enemy resorts to measures which suppress, or aim at suppressing, his legitimate intercourse with neutrals, and they do not prevent these measures from being carried out, he is justified in resorting to reprisals, and in turn preventing intercourse between his enemy and neutrals.

Thus, when in February 1915, during the World War, Germany, as a measure of reprisals against the Allies, mainly because they would not carry out the rules of the unratified Declaration of London,<sup>3</sup> decreed all the waters surrounding the British Isles to be a war zone, in which every enemy merchant-vessel would be destroyed by submarines without it being always possible to save crew and passengers, and neutral ships might be exposed to danger, Great Britain by Order in Council of March 11, 1915,<sup>4</sup> and France by decree of March 13, 1915,<sup>5</sup> retaliated by ordering their fleets to

<sup>1</sup> See above, § 191, and below, § 411. See Sherman in *A.J.*, xvi. (1922) pp. 400-419 and pp. 561-584.

<sup>2</sup> § 294; see also §§ 316, 318.

<sup>3</sup> See above, § 292.

<sup>5</sup> Dalloz, *Jurisprudence générale*

<sup>4</sup> *London Gazette*, March 15, 1915. (1915), pp. 78-79.

prevent all exports from, and imports to, Germany, and by an Order in Council of January 10, 1917, the Order of March 11, 1915, was extended to all enemy countries.<sup>1</sup> On February 1, 1917, Germany embarked upon a further extended submarine practice with the result that a new retaliatory Order in Council was issued on February 16, 1917,<sup>2</sup> which decreed that any vessel carrying goods with an enemy destination, or of enemy origin, should be liable to capture and condemnation in respect of the carriage of such goods unless she called before capture at a British or Allied port for the examination of her cargo, and that goods found on examination to be goods of enemy origin or enemy destination should be liable to condemnation. The United States of America<sup>3</sup> and other States protested against these British and French reprisals, asserting that the measures resorted to were a violation of neutral rights. This was certainly the case; but this fact did not render the Allied action illegal seeing that neutrals did not prevent Germany from carrying out her illegal submarine practice, which attempted to cut off entirely all communication with Great Britain. Just as neutrals who do not, or are not able to, prevent a belligerent from marching troops through their neutral territories cannot complain if the other belligerent likewise invades these territories and attacks the enemy there, so neutrals who do not prevent one belligerent from unlawfully obstructing commercial intercourse between his opponent and themselves cannot complain if that opponent replies by resorting to measures designed to stop intercourse between the first belligerent and neutrals. The rule that belligerents must not interfere with the legitimate commerce of neutrals presupposes that both belligerents will carry it out, and that neutrals will prevent both of them from violating it. If, on the contrary, neutrals acquiesce in or are unable to prevent the violation of this rule by one belligerent to the vital disadvantage of the other belligerent, the latter cannot be expected to suffer this without redress, and must be excused if, in retaliating upon the enemy, he also violates

<sup>1</sup> *London Gazette*, January 12, 1917.

<sup>3</sup> *Parl. Papers*, Misc. No. 14 (1916),

<sup>2</sup> *London Gazette*, February 23, 1917. Cmd. 8233.

the rule.<sup>1</sup> Moreover, if, as suggested above, International Law does not prohibit reprisals even when they happen to conflict with otherwise recognised rights of neutrals, then, on principle, no objection can properly be raised against measures taken with due regard to considerations of humanity and calculated to enhance the effectiveness of such reprisals, for instance, by ordering the confiscation instead of the detention of the goods in question.<sup>2</sup>

The war which broke out in 1939 raised once more the problem of reprisals in relation to neutrals. Thus after Germany had embarked upon a campaign of illegal submarine warfare and mine-laying, Great Britain and France issued at the end of November 1939<sup>3</sup> retaliatory orders largely identical with those announced in March 1915.

War  
Zones.

§ 319a. The World War was the occasion of the develop-

<sup>1</sup> See below, § 360 (n.). See Phillimore in the *Grotius Society*, ii. p. 175; Pyke, *The Law of Contraband of War* (1915), p. 4; *A.J.*, ix. (1915) pp. 673, 680. In *Harvard Research* (1939), where the practice is reviewed in some detail at pp. 392-419, the principle is formulated, as expressing 'an existing rule of international law,' that the belligerent is not relieved of his duties towards the neutral even when engaged in reprisals for illegal acts of his opponent (p. 392). The British Prize Courts have recognised the Order in Council of March 11, 1915, as being in accordance with International Law. See *The Stigstad* [1919] A.C. 279; 3 B. and C.P.C. 347; *The United States* [1917] P. 30; 2 B. and C.P.C. 390; *The Frederick VIII.* [1917] P. 43; 2 B. and C.P.C. 395; for other cases see Verzijl, §§ 331-333. In the case of the goods of neutral subjects which were detained under the Order in Council of March 11, 1915, it was held that the expenses of their discharge, detention, and sale must be borne by the claimants, and that, in the absence of negligence attributable to the captors, the claimants were unable to recover damages for loss of, or injury to, the goods; *The United States* [1920] P. 430; 3 B. and C.P.C. 750; *The New Sweden* [1922] 1 A.C. 229; 3 B. and C.P.C. 1000.

<sup>2</sup> This is the reason why the editor has felt compelled to abandon the different view expressed in the previous editions of this work.

See the judgment in *The Leonora* [1918] P. 182, 3 B. and C.P.C. 181, which declared the Order in Council of February 16, 1917, to be justified as a reprisal by International Law. It was affirmed by the Privy Council [1919] A.C. 974; 3 B. and C.P.C. 385. See also *The Bernisse, The Elve* [1921] 1 A.C. 458; 3 B. and C.P.C. 771. On the subject of 'judicial reprisals,' Scott, *Cases*, p. 500, cites a passage from the judgment of Martin J. in *The Leonor* (1916) 3 B. and C.P.C. at p. 111 (in the Prize Court of British Columbia). And see the case of *The Cysne* (award of June 1930, in the arbitration between Germany and Portugal) where it was held that reprisals intended to injure the belligerent but aimed directly and deliberately against neutral subjects were illegal: *Annual Digest*, 1929-1930, Case No. 287. See also Garner, *Prize Law*, Nos. 251-270; Colombos, §§ 220-225; and Higgins in *B.Y.*, 1927, pp. 128-146.

<sup>3</sup> See above, p. 385, and below, p. 655. As to the laying of mines in Norwegian territorial waters in April 1940, see below, p. 545, n. 1.

ment of the new, or almost new, measure of belligerent interference with the freedom and safety of neutral shipping mentioned in the preceding section ; namely, the declaration by belligerents of ' war zones ' or ' military areas ' at sea,<sup>1</sup> and the exclusion therefrom of neutral shipping mainly by means of submarine contact mines, but in some cases also by means of submarines. Shortly before the outbreak of the Russo-Japanese War, Japan had declared certain ' defence sea areas,' but they were situated mainly in waters closely adjacent to her coasts ; it was not until the World War, however, that the practice became systematised as a means of warfare. On November 3, 1914, the British Government declared the whole of the North Sea to be a ' military area ' ; on February 4, 1915, the German Government declared the whole of the waters round England, Scotland, and Ireland to be ' military area ' (*Kriegsgebiet*) ; in both cases the areas affected were varied from time to time, and by the German order of January 31, 1917, the German area was extended to include the waters round France, Italy, Greece, Asia Minor, and North Africa. The British measure was officially described as a ' counter-measure,' and as an ' exceptional measure appropriate to the novel conditions under which this war is being carried on,' and was in substance a retaliation for the German mine-laying policy. The German measure of February 4, 1915, was expressly described as retaliatory ; but the two measures differed to an enormous extent in the degree in which they complied with the rule governing all reprisals the effect of which is not confined to the enemy—namely, that the reprisals must not inflict upon neutral States and their

<sup>1</sup> Hall, § 185 ; Garner, i. §§ 214, 227 ; *International Law Association, Twenty-ninth Report* (1920), pp. 166-173 ; Lawrence and Carter in *Grotius Society*, i. (1916) at pp. 48-49 ; Fauchille, §§ 1316 (10), 1271 (1) ; Liszt, § 64 B. ; Rocholl in *Strupp, Wört.*, ii. 49-51 ; Triepel, *Konterbande, Blockade, Seesperre* (1918) ; Hyde, ii. § 720 : ' a war zone in maritime operations may be said to comprise an area of water which a belligerent attempts to control, and within

which it denies to foreign shipping generally the same measure of protection which the latter might elsewhere claim ' ; and, the same, § 721 ; Baty, pp. 447-453 ; Keith's Wheaton, pp. 899, 900 ; Pohl in *Strupp, Wört.*, iii. pp. 1062, 1071 ; *Harvard Research* (1939), pp. 694-708 ; Schmitz in *Z.ö.V.*, viii. (1938) pp. 641-671 ; Smith in *Hague Recueil*, 63 (1938) (i.), pp. 648-662 ; *Harvard Research* (1939), pp. 694-708.



subjects a degree of hardship and inconvenience which is unreasonable, having regard to all the circumstances of the case.<sup>1</sup> In both cases neutral shipping suffered grievous hardship, but the British Government did at least indicate lanes through the mine-fields through which ships might pass with safety<sup>2</sup>; while the German Government claimed not only to close the areas affected (*Seesperre*), but to enforce this closure both with mines and with submarine craft which would, and did, torpedo at sight any enemy merchant-vessel which dared to enter therein; and accordingly attempts are made to justify the torpedoing of the *Lusitania*<sup>3</sup> on this ground. Although neutral vessels recognisable as such were on paper exempted by the German Government from this method of enforcing the war zone, a great many of them suffered the same fate.

The legality of the declaration of war zones needs to be considered, first, as between the belligerents, and secondly, as between the belligerent declaring the war zone and neutral States. As between the belligerents only, provided that the war zone is enforced by the use of means, whether submarine contact mines, or surface or submarine craft, which comply with the laws of maritime warfare, both customary and conventional, there can be no doubt of the lawfulness of the practice. But when we consider the second aspect, we are faced with the fundamental principle of the freedom of neutrals to carry on their commerce on the high seas during war without molestation of any kind not recognised by International Law; and the burden of

<sup>1</sup> See *The Stigstad*, above, § 319 (n.).

<sup>2</sup> This material fact goes perhaps some way in the direction of explaining why the Government of the United States, while protesting against the German measures, experienced 'no like sense of outrage' (Hyde, ii. p. 427) in regard to the mine-fields laid by Great Britain.

<sup>3</sup> E.g. by Fleischmann in Liszt, § 64 B, 2 (note). It is difficult to follow Fleischmann's argument (in Liszt, § 64 B, 2) upon *Seesperre*. If the editor understands him aright, it is this: to establish a *Seesperre*, automatic contact mines may be laid, provided that previous warning is

given; why, therefore, may not submarines be used for the same purpose, and why may they not attack their victims at sight, provided that a warning has been given that within a particular zone they will do so? This seems to amount to a claim to break any rule of warfare provided that you give previous notice of your intention to do so. Why should not surface-craft also attack, merchantmen, enemy or neutral, within the zone declared, provided previous notice of their intention has been given?

As to the sinking of the *Lusitania* see above, § 194a.

proving that International Law has recognised a particular kind of molestation must lie upon the belligerent asserting it. The different kinds of recognised molestation are usually capable of being grouped under the headings of Stoppage of Contraband, Enforcement of Blockade, Prevention of Unneutral Service, and Legitimate Reprisals, together with the exercise of the ancillary rights of visit and search ; and it is further recognised that neutral shipping cannot complain of the danger and inconvenience attendant upon the lawful laying of submarine contact mines.<sup>1</sup> But it is submitted that, apart from these cases, no warrant can be found for the legality of the declaration of a war zone exclusively controlled by a belligerent, and entered by neutral ships only at their peril, as a specific means of warfare ; and that the declaration of a war zone can only be justified as a

<sup>1</sup> This includes probably the right of laying mine-fields duly notified to neutrals. The lawful exercise of that right, even when amounting to the establishment of a 'war zone,' is probably independent of any of the four grounds, enumerated above, of authorised interference with neutral commerce. As stated, during the World War the laying of mine-fields was adopted partly as a measure of retaliation and partly as one of protection against enemy submarines and mines. Subsequently it went beyond these limits. In 1918, when the United States became a belligerent they participated in laying the North Sea mine barrage which extended from Scotland to the Norwegian territorial waters. On the outbreak of the war in 1939 Great Britain laid a mine-field in the greater part of the Channel off Dover as well as in the part of the North Sea adjoining the German and the Danish coasts. Germany did the same in order to bar the access to her North Sea coast. At the end of December 1939 the British Admiralty announced that as a protection against German indiscriminate mine-laying a mine barrage, between twenty and fifty miles wide, would be laid along the entire British East coast, leaving a narrow space between the barrage and the coast for navigation. On April 12, 1940, after the invasion of Denmark and

Norway by Germany, the Admiralty announced that mines had been laid over a large area in the Skaggerak (in which a channel twenty miles wide was left open) and the Kattegat, and in the North Sea from a point near the Dutch coast to the Norwegian coast. On April 14 a further mine-field was announced to have been laid in the whole of the Kattegat and in the Southern Baltic so as to cover the whole of the German Baltic coast up to Swedish territorial waters. Germany also laid mines in some of these areas. These developments tended in the direction of a successful assertion of the right of the belligerent to lay mine-fields on the high seas irrespective of reprisals but subject to the duty to ensure the relative safety of neutral traffic. On the other hand, the laying of mines by the Allies in some specified areas of Norwegian territorial waters on April 8, 1940, in so far as it could be legally justified, could be explained either on the ground of reprisals (as in fact it was justified by the Allies by reference to indiscriminate destruction of neutral shipping by Germany) or as an act of self-help calculated to put a stop to the abuse of Norwegian territorial waters for the purpose of passage differing from the ordinary commercial routes and intended as a means of avoiding capture. See below, § 325A (n.).

reprisal for a breach of law by the enemy, and must then comply with the conditions mentioned in the preceding paragraph for determining the lawfulness of the occasion on which, and of the manner in which, such reprisals as affect neutral States and their subjects are exercised.

## II

### NEUTRALS AND WARLIKE OPERATIONS

Vattel, iii. §§ 105, 118-135—Hall, §§ 215, 219, 220, 226—Westlake, ii. pp. 227-232—Lawrence, §§ 229, 234-240—Manning, pp. 225-227, 245-250—Twiss, ii. §§ 217, 218, 228—Taylor, §§ 618, 620, 632, 635—Walker, §§ 55, 57, 59-61—Holland, *Lectures*, pp. 455-460—Keith's Wheaton, pp. 930-933, 942-950—Wharton, iii. §§ 397-400—Moore, vii. §§ 1293-1303—Wheaton, §§ 426-429—Bluntschli, §§ 758, 759, 763, 765, 769-773—Heffter, §§ 146-150—Geffcken in *Holtzendorff*, iv. pp. 657-676—Ullmann, § 191—Fauchille, §§ 1449-1457—Despagnet, Nos. 690-692—Rivier, ii. pp. 395-408—Calvo, iv. §§ 2644-2664, 2683—Fiore, iii. Nos. 1546-1550, 1574-1575, 1582-1584—Martens, ii. §§ 131-134—Kleen, i. §§ 70-75, 116-122—Mérignhac, iii\*. pp. 516-547—Pillet, pp. 284-289—Perels, § 39—Testa, pp. 173-180—Heilborn, *Rechte*, pp. 4-12—Dupuis, Nos. 308-310, 315-317, and *Guerre*, Nos. 277-294—Hyde, ii. §§ 850-856, 861-862, 880, 887-888—Rolin, §§ 992-996, 1077-1081, 1102-1110—Cruchaga, §§ 1183-1192—Wijnveld, pp. 40-153—Genet, §§ 400-424—*Land Warfare*, §§ 465-471—Einicke, *Rechte und Pflichten der neutralen Mächte im Seekrieg* (1912), pp. 22-70—Wehberg, § 11—Ariga, *La Chine et la grande guerre européenne* (1920), pp. 31-106—Luchaire, *Droits de séjour et d'action des navires belligérants dans les eaux territoriales neutres* (1933).

Hostilities by  
and  
against  
Neutrals.

§ 320. The duty of impartiality incumbent upon a neutral must obviously prevent him from committing hostilities against either belligerent. This would need no mention except to distinguish between hostilities on the one hand, and, on the other, military or naval acts of force by a neutral for the purpose of repulsing violations of his neutrality committed by either belligerent. Hostilities by a neutral are acts of force performed for the purpose of attacking a belligerent. They are acts of war, and they create a condition of war between such neutral and the belligerent concerned. If, however, a neutral does not attack a belligerent, but only repulses him by force when he violates, or attempts to violate, the neutrality of the neutral, this does not constitute hostilities. Thus, if men-of-war of a belligerent attack an enemy vessel in a neutral port and are repulsed

by neutral men-of-war, or if belligerent forces try to make their way through neutral territory and are forcibly prevented by neutral troops, no hostilities have been committed by the neutral, who has done nothing else than fulfil his duty of impartiality. Article 10 of Convention V. enacts categorically that 'the fact of a neutral Power repelling, even by force, attacks on its neutrality, cannot be considered as a hostile act.'<sup>1</sup> And stress must be laid on the fact that it is no longer legitimate for a belligerent to pursue<sup>2</sup> military or naval forces who take refuge on neutral territory; should a belligerent, nevertheless, do this, he must, if possible, be repulsed by the neutral.

It is, on the other hand, likewise obvious that hostilities against a neutral on the part of either belligerent are acts of war, and not mere violations of neutrality. Thus the German attack on Belgium in 1914, to enable German troops to march through Belgian territory and attack France, created war<sup>3</sup> between Germany and Belgium. If, however, forces of one belligerent attack forces of the other belligerent which have taken refuge on neutral territory, or which are there for other purposes, such attacks do not constitute hostilities against the neutral, but are mere violations of neutrality; and they must be repulsed, or reparation must be made for them, as the case may be.<sup>4</sup>

<sup>1</sup> See Bassompierre in *R.I.*, 3rd ser., iv. (1923) pp. 236-246.

<sup>2</sup> See above, § 288, and below, § 347 (4); and Rolin, § 1006.

<sup>3</sup> See above, § 71.

<sup>4</sup> See below, p. 616. Quite a peculiar condition arose at the outbreak of and during the Russo-Japanese War. The ends for which Japan went to war were the expulsion of the Russian forces from the Chinese province of Manchuria and the liberation of Korea, which was at the time an independent State, from the influence of Russia. Manchuria and Korea became, therefore, part of the region of war, although both were neutral territories, and neither China nor Korea became a party to the war. The hostilities which occurred on these neutral territories were in no wise directed against the neutrals

concerned. This anomalous situation arose out of the inability of both China and Korea to free themselves from Russian occupation and influence, Japan considering her action (which must be classified as an intervention) to be justified on account of her vital interests. The Powers recognised this situation by influencing China not to take part in the war, and by influencing the belligerents not to extend military operations beyond the borders of Manchuria. Manchuria and Korea having become part of the region of war (see above, § 71; Lawrence, *War*, pp. 268-294; Ariga, *La guerre russo-japonaise* (1908), §§ 16-22), the hostilities committed there by the belligerents against one another cannot be classified as violations of neutrality. The cases of the *Variag* and the *Korietz*, and the case

Furnish-  
ing  
Troops  
and Men-  
of-War to  
Belliger-  
ents.

§ 321. If a State remains neutral, it violates its impartiality by furnishing a belligerent with troops or men-of-war; and it matters not whether it renders such assistance to one of the belligerents, or to both alike. Whereas Convention V. does not mention the furnishing of troops, Article 6 of Convention XIII. enacts that 'the supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war material of any kind whatever, is forbidden.'

However, it was controversial whether a neutral State, which in time of peace had concluded a treaty with one of the belligerents, to furnish him in case of war with a limited number of troops, would violate its neutrality by fulfilling its treaty obligation. Several writers<sup>1</sup> answered the question in the negative, and there is no doubt that during the eighteenth century such cases happened. But no case happened during the nineteenth century, and it is clear

of the *Reshitelni*, may illustrate the peculiar condition of affairs:

(1) On February 8, 1904, a Japanese squadron under Admiral Uriu entered the Korean harbour of Chemulpo and disembarked Japanese troops. The next morning Admiral Uriu requested the commanders of two Russian ships in that harbour, the *Variag* and the *Koriets*, to leave the harbour and engage him in battle outside, threatening to attack them inside the harbour in case they refused. But they did not refuse, and the battle took place outside the harbour, but within Korean territorial waters (see Lawrence, *War*, pp. 279-289, and Takahashi, pp. 462-466). The complaint made by Russia, that in this case the Japanese violated Korean neutrality, would seem to be unjustified, since Korea fell within the region of war. It was for this reason that the Japanese Prize Courts in 1904, during the Russo-Japanese War, condemned the Russian vessels *Ekaterinoslav* (Hurst, ii. p. 1) and *Mukden* (*ibid.*, ii. p. 12), although they were captured, not on the open sea, but in the territorial waters of Korea. See *The Tinos*, above, § 71(n.).

(2) The Russian destroyer *Reshi-*

*telni*, one of the vessels that escaped from Port Arthur on August 10, 1904, took refuge in the Chinese harbour of Chifu. On August 12, two Japanese destroyers entered the harbour, captured her, and towed her away (see Lawrence, *War*, pp. 291-294, and Takahashi, pp. 437-444). There ought to be no doubt that this was a violation of neutrality (see below, §§ 360 and 361, where the cases of the *Dresden* and the *General Armstrong* are discussed), since Chifu does not belong to the part of China which fell within the region of war.

Anomalous also was the situation during the World War, when, while Greece was still neutral (see above, § 306), the Allies occupied Salonika and also Corfu and certain other Greek islands. The forces which had landed at Salonika were attacked by Bulgaria and the other Central Powers (see below, § 323, Leontiadès in *Z.ö.V.*, ii. (1931) pp. 120-170, and Garner, ii. §§ 464-473).

<sup>1</sup> See, for instance, Bluntschli, § 759, and Heffter, § 144. See above, § 306 (2), where the case is quoted of Denmark furnishing troops to Russia in 1788 during a Russo-Swedish war.

that nowadays the answer must be in the affirmative, since a qualified neutrality <sup>1</sup> is no longer admissible.<sup>2</sup>

§ 322. Although several States, as, for instance, Great Britain<sup>3</sup> and the United States of America, by their Municipal Law prohibit their subjects from enlisting in the military or naval service of belligerents, the duty of impartiality incumbent upon neutrals does not at present include any necessity for such prohibition, provided that the individuals concerned cross the frontier singly<sup>4</sup> and not in a body; moreover, as has already been mentioned, the subjects of neutral States who thus enlist do not thereby commit any offence against the rules of International Law.<sup>5</sup> But a neutral must recall his military and naval officers who may have been serving in the army or navy of either belligerent before the outbreak of war; and must retain military and naval officers who want to resign their commissions for the obvious purpose of enlisting in the service of either belligerent.

On the other hand, there is no violation of neutrality in a neutral allowing surgeons and other non-combatant members of his army invested with a character of inviolability according to the Geneva Convention to enlist, or to remain, in the service of either belligerent.

§ 323. In contradistinction to the practice of the eighteenth century,<sup>6</sup> it is now generally recognised that

<sup>1</sup> See above, § 305.

<sup>2</sup> As regards furnishing men-of-war to belligerents, the question arose during the Russo-Japanese War whether a neutral violates his duty of impartiality by not preventing his national steamship companies from selling to a belligerent such of their liners as are destined in case of war to be incorporated as cruisers in the national navy. The question was discussed on account of the sale to Russia of the *Augusta Victoria* and the *Kaiserin Maria Theresia* by the North German Lloyd, and the *Fürst Bismarck* and the *Columbia* by the Hamburg-American Line; for these vessels were at once enrolled in the Russian Navy as second-class cruisers, re-named *Kuban*, *Ural*, *Don*, and *Terek*. Had these vessels by an arrangement with the German Gov-

ernment really been auxiliary cruisers to the German Navy, and had the German Government given its consent to the transaction, a violation of neutrality would have been committed by Germany. But the German Press maintained that they had not been auxiliary cruisers, and Japan did not lodge a protest with Germany on account of the sale. If these liners were not auxiliary cruisers to the German Navy, their sale to Russia was a legitimate sale of articles of contraband. See below, § 397.

<sup>3</sup> See § 4 of the Foreign Enlistment Act, 1870.

<sup>4</sup> See Article 6 of Convention V.

<sup>5</sup> See above, § 82a.

<sup>6</sup> See Vattel, iii. §§ 119-132. See also Butler and Maccoby, *The Development of International Law* (1928); pp. 234-239.

Subjects  
of  
Neutrals  
fighting  
among  
Belli-  
gerent  
Forces.

Passage  
of Troops  
and War  
Material

through  
Neutral  
Territory.

a violation of the duty of impartiality is involved when a neutral allows to a belligerent the passage of troops or the transport of war material or supplies over his territory.<sup>1</sup> And it matters not whether a neutral gives such permission to one of the belligerents only, or to both alike.

(a) *The Passage of Troops*

The practice of the eighteenth century was unavoidable at that time, since many German States consisted of parts distant one from another, so that their troops had to pass through other sovereigns' territories for the purpose of reaching outlying parts. At the beginning of the nineteenth century, the passing of belligerent troops through neutral territory still occurred. Prussia, although she at first repeatedly refused, at last in 1805 entered into a secret convention with Russia granting Russian troops passage through Silesia during war with France. On the other hand, even before Russia had made use of this permission, Napoleon ordered Bernadotte to march French troops through the then Prussian territory of Anspach without even asking the consent of Prussia. In spite of the protest of the Swiss Government, Austrian troops passed through the Swiss territory in 1813; and when in 1815 war broke out again through the escape of Napoleon from the island of Elba and his return to France, Switzerland granted to the allied troops passage through her territory.<sup>2</sup> But since that time it has become universally recognised that all passage of belligerent troops through neutral territory must be prohibited, and the Powers declared *expressis verbis* in the Act of November 20, 1815, which neutralised Switzerland, and was signed at Paris,<sup>3</sup> that 'no inference unfavourable to the neutrality and inviolability of Switzerland can and must be drawn from the facts which have caused the passage of the allied troops through a part of the territory of the Swiss Confederation.'<sup>4</sup> The few instances<sup>5</sup> in which during the nineteenth century States pretended to remain

<sup>1</sup> See Dumas in *R.G.*, xvi. (1909), pp. 289-316.

<sup>2</sup> See Wheaton, §§ 418-420.

<sup>3</sup> See Martens, *N.R.*, ii. p. 741.

<sup>4</sup> See also above, § 292g.

<sup>5</sup> See Heilborn, *Rechte*, pp. 8-9.

neutral, but nevertheless allowed the troops of one of the belligerents passage through their territory, led to war between the neutral and the other belligerent.

As has been already stated,<sup>1</sup> in October 1915, during the World War, while Greece was still neutral, the Allies on the invitation of M. Venizelos, then Prime Minister of Greece, disembarked troops at Salonika for the purpose of bringing aid to Serbia. The Greek Government protested *pro forma*, but did not put any obstacle in the way of their landing. This led to an attack on Salonika by the Central Powers, but war between the Central Powers and Greece did not ensue until much later.<sup>2</sup>

However, just as in the case of furnishing troops, it is a moot point whether passage of troops can be granted without violating the duty of impartiality incumbent upon a neutral, in case a neutral is required to grant it in consequence of an existing State servitude, or of a treaty previous to the war. There ought to be no doubt that, since nowadays qualified neutrality is no longer admissible, the question must be answered in the negative,<sup>3</sup> unless, as in the case of the Covenant of the League of Nations, the other belligerent must be deemed to have consented in a treaty to a neutral

<sup>1</sup> Above, §§ 306, 320 (n.).

<sup>2</sup> Above, § 320 (n.), and Garner, ii. §§ 464-473. For a criticism of the action of the Allies in Greece see Strupp, *La situation internationale de la Grèce (1821-1917)*; Leontiadès in *Z.ö.V.*, ii. (1931) pp. 142-170; Headlam-Morley, *Studies in Diplomatic History* (1930), pp. 140-142. See also Driault and Lhéritier, *Histoire diplomatique de la Grèce de 1821 à nos jours*, 5 (1928); Frangulis, *La Grèce et la crise mondiale*, i. (1926) pp. 323 et seq. And see *Coenca Brothers v. Germany*, decided by the Greco-German Mixed Arbitral Tribunal, *Annual Digest*, 1927-1928, Case No. 389.

<sup>3</sup> See above, §§ 305-306 and § 292d, and vol. i. § 207. See also Clauss, *Die Lehre von den Staatsdienstbarkeiten* (1894), pp. 212-217, and Dumas in *R.G.*, xvi. (1909) pp. 289-316. See also Ariga, *La Chine et la grande guerre européenne* (1920), who dis-

cusses the transport of Russian troops on the Chinese Eastern Railway in the course of the World War, pp. 87-93. Fauchille, No. 1461 (1), gives details of the passage, after the conclusion of the armistice, of German troops through the Dutch territory of Limburg. While withdrawing from the occupied enemy territory in accordance with the terms of the armistice, German troops passed, from November 18, 1918, through this part of Dutch territory in order to reach Germany. They passed in groups of one hundred, and were disarmed by the Dutch authorities but not interned; the Allies protested. And see vol. i. § 206 (n.) on the grant of the use of naval and air bases and, generally, of means of communication in the Treaty of Alliance between Great Britain and Iraq in 1930 and Great Britain and Egypt in 1936, and above, § 71, for similar provisions with regard to some mandated territories.



State granting, in certain contingencies, the right of passage to troops co-operating for the enforcement of the Covenant.

(b) *The Transport of War Material and Supplies*

With regard to the transport of war material and supplies, Article 2 of Hague Convention V. categorically enacts that 'belligerents are forbidden to move across the territory of a neutral Power troops or convoys either of munitions of war or of supplies.' But different from this case is the case in which munitions and the like are sent by private individuals to a belligerent across neutral territory. As to this, Article 7 of that Convention lays down the rule that 'a neutral Power is not bound to prevent the export or transit, for one or the other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or fleet.'<sup>1</sup>

The distinction between these two articles was incidentally considered<sup>2</sup> during the controversy that arose in the World War, between Great Britain and Holland, concerning the transit of metals from Belgium (then under German military occupation) to Germany, and of sand and gravel from Germany to occupied Belgium, through Dutch territory. Great Britain argued that Holland, by permitting such traffic (whatever the purpose for which the materials were used), was giving direct assistance to Germany, and so committing a violation of neutrality. Holland, on the other hand, argued that she was only bound to prevent the transit of these materials when they were connected with military operations, and that the consignments which had passed through were not so connected.<sup>3</sup>

<sup>1</sup> See Ariga, *La Chine et la grande guerre européenne* (1920), pp. 94, 95. Article 22 of the Habana Convention on Maritime Neutrality of 1928 (see above, § 68) imposes upon the signatories the duty to permit the transit of war material, etc., in the event of one of the belligerents being a land-locked country having no other means of supplying itself, provided that such transit does not endanger the vital interests of the country through which transit is requested.

<sup>2</sup> Parl. Papers, Misc. No. 17 (1917), Cmd. 8693, and Garner, ii. § 570.

<sup>3</sup> Garner, ii. § 570, and Ch. de Visscher in *R.G.*, xxvi. (1919) pp. 142-166. The passage of a ship carrying munitions through an international canal (see above, § 72, and the *Wimbledon* (1923), in the Permanent Court of International Justice, Publications, Series A, No. 1) is not incompatible with the neutrality of the riparian State.

§ 324. The passage of wounded soldiers is different from that of troops. If a neutral allows the passage of wounded soldiers, he certainly does not render direct assistance to the belligerent concerned. But it may well be that he gives indirect assistance because a belligerent, being relieved from transporting his wounded, can now use the lines of communication for the transport of troops, war material, and provisions. Thus, when in 1870, after the battles of Sedan and Metz, Germany applied to Belgium and Luxemburg to allow her wounded to be sent through their territories, France protested on the ground that the relief thereby given to the German lines of communication would be an assistance to the military operations of the German Army. Belgium, on the advice of Great Britain, did not grant the request, but Luxemburg did.<sup>1</sup>

According to Article 14 of Convention V., a neutral Power *may* grant the passage of the wounded or sick at the request of a belligerent. If he does, the trains bringing them must carry neither combatants nor war material, and those of the wounded and sick who belong to the army of the other belligerent must remain on the neutral territory, must there be guarded by the neutral Government, and, after having recovered, must be prevented from returning to their home State and rejoining their corps.<sup>2</sup> By Article 14 it is left to the discretion of a neutral whether or not he will allow the passage of wounded and sick; he must, therefore, investigate every case, and come to a conclusion according to its merits. During the World War, the United States, while neutral, refused to allow certain wounded Canadian soldiers to pass through American territory on their way home.<sup>3</sup>

<sup>1</sup> See Hall, § 219; Geffcken in *Holtzendorff*, iv. p. 664.

<sup>2</sup> According to Article 15 of Convention V., the 'Geneva Convention applies to the sick and wounded interned in neutral territory.' See Favre, *L'internement en Suisse des prisonniers de guerre malades ou blessés* (1917-1919).

<sup>3</sup> See, however, Hoffer in *Rev. intern. de la Croix-Rouge*, February 15,

1919, pp. 159-160, cited in Fauchille, No. 1462 (4), and see Fauchille, § 1460 (1). At the end of 1914 the Swiss Federal Council invited the German and French Governments to exchange the severely wounded, offering to grant to them freedom of passage through Swiss territory. The offer was accepted, and from March 1915 to November 1916, 2343 German and 8668 French soldiers passed thus through Switzerland.

Passage of  
Men-of-  
War.  
(i)  
Through  
the  
Maritime  
Belt.

§ 325. In contradistinction to passage of troops through his territory, the duty of impartiality incumbent upon a neutral does not require him to forbid the passage of belligerent men-of-war<sup>1</sup> through the maritime belt forming part of his territorial waters. Article 10 of Convention XIII. categorically enacts that 'the neutrality of a Power is not violated (*n'est pas compromise*) by the mere passage of belligerent men-of-war and their prizes.' Since<sup>2</sup> every littoral State may in time of peace prohibit the passage of foreign men-of-war through its maritime belt unless it forms a part of the highways of international traffic,<sup>3</sup> it may certainly prohibit the passage of belligerent men-of-war in time of war. Thus, at the outbreak of the World War in 1914, Holland declared that belligerent war-vessels would not be allowed passage through her maritime belt in Europe, and later she seized German and British submarines which, though not in distress, had entered Dutch territorial waters, and interned their crews. Again, in 1916, Norway declared that henceforth belligerent submarines would not be allowed to pass through her territorial waters.<sup>4</sup> However, no duty exists for a neutral to prohibit such passage in time of war. Nor need he exclude belligerent men-of-war from his ports, although he may do this likewise. The reason is that such passage and such admission to ports involves very little assistance indeed, and is justified by the character of the sea as an international highway. But it is obvious that belligerent men-of-war must not commit any hostilities against enemy vessels during their passage, and must not use the neutral maritime belt and neutral ports as a basis for their operations against the enemy.<sup>5</sup>

The Case  
of the  
*Altmark*.

§ 325A. The limits, indicated in the concluding sentences of the preceding section, of the right of the neutral State

<sup>1</sup> See Trainé, *Das Gastrecht im Seekrieg* (1912), §§ 8-12; *Harvard Research* (1939), pp. 421-425.

<sup>2</sup> See above, vol. i. § 188.

<sup>3</sup> See Hall, § 42; Hyde, i. § 154; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 121. But see Westlake, i. p. 196. The replies of Governments sent in connection with the questionnaire of

the Committee of Jurists for the Progressive Codification of International Law (*Bases of Discussion*, vol. ii., *Territorial Waters*, pp. 65-75) indicate that the great majority of States now recognise a right of innocent passage for warships in time of peace subject to municipal regulations.

<sup>4</sup> See Garner, ii. § 562.

<sup>5</sup> See below, § 333.

to permit the passage of belligerent men-of-war through its territorial waters were well illustrated by the case of the *Altmark*. The *Altmark* was a German auxiliary vessel carrying over three hundred British officers and sailors taken from a number of British merchant-vessels sunk by a German armoured ship, the *Admiral Graf Spee*. On February 14, 1940, the *Altmark* entered Norwegian territorial waters on her way from South America to Germany. After the Norwegian authorities had ascertained that she was an auxiliary vessel they granted her permission to navigate through Norwegian territorial waters. They refused the request of the commander of the British naval forces who asked that the *Altmark* be searched with the view to ascertaining whether she carried British prisoners. Thereupon, on February 16, the *Cossack*, a British destroyer, entered the fjord within which the *Altmark* had sought refuge and, without attempting to capture or sink the vessel, released the prisoners and brought them to England. Norway vigorously protested on the ground that the British action constituted a violation of her neutrality.

While according to customary International Law and to Hague Convention No. XIII. the neutral State is entitled to permit the passage of belligerent men-of-war through its territorial waters, the nature and the duration of such passage are governed by the overriding principle that neutral territorial waters must not be permitted to become a basis for warlike activities of either belligerent.<sup>1</sup> The

<sup>1</sup> Article 5 of Convention No. XIII. provides that 'belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries.' This principle is of assistance in removing the doubts arising out of the juxtaposition of Article 10 which, without providing for a time limit, declares as not inconsistent with neutrality the passage of men-of-war through neutral territorial waters, and Article 12 which limits to twenty-four hours the period within which belligerent men-of-war may remain within the territorial waters of the neutral State. Probably acquiescence in such passage as causes the men-of-war to remain within

territorial waters for more than twenty-four hours is not inconsistent with neutrality so long as it does not result in transforming the territorial waters into a base of warlike operations for offensive or for defensive purposes. This is believed to be the proper interpretation of the term 'mere passage' in Article 10 of the Convention. The passage must be innocent in the primary meaning that it is a normal incident of international navigation and does not amount to an abuse of the right or of the permission of passage by being a device for gaining immunity by circuitous resort to the shelter of neutral waters in a manner involving a conspicuous

prolonged use of neutral territorial waters by belligerent men-of-war or their auxiliaries for passage not dictated by normal requirements of navigation and intended, *inter alia*, as a means of escaping capture by superior enemy forces must, therefore, be deemed to constitute an illicit use of neutral territory which the neutral State is by International Law bound to prevent by the means at his disposal or which, in exceptional cases, the other belligerent is entitled to resist or remedy by way of self-help.<sup>1</sup>

(ii)  
Through  
Rivers.

§ 325a. It is believed that, as a general rule, a neutral State may not grant, and a belligerent State has no right

prolongation of the voyage. In so far as the term in question is borrowed from the law of peace the passage must, in relation to the neutral, be innocent in the sense that it must not be prejudicial, amongst others, to the 'safety and good order' of the littoral State (see the British Reply to the Questionnaire of the Committee of Jurists for the Progressive Codification of International Law: *Bases of Discussion*, vol. ii., *Territorial Waters*, p. 68). These interests may be compromised in consequence of neutral waters becoming a basis of naval operations or as a means of passage in circumstances, like those in the case of the *Altmark*, constituting a powerful inducement to the naval forces of the opposing belligerent to prevent the unhindered passage of the enemy vessel. It is probable that these considerations apply also to the passage of the merchant-vessels of the belligerent through neutral waters. See also below, § 347 (4).

The Hague Convention No. XIII. was not binding in the war which broke out in 1939, as Great Britain had not ratified it and Poland had not adhered to it. However, it appears from the discussions at the Hague Conference, whose deliberations on the question centred mainly round the British draft, that the relevant provisions were regarded as being in accordance with customary International Law. Article 10 was introduced by the British delegation (*Actes et Documents*, iii. p. 721, annexe 56), and the reference in it to mere passage must be regarded as synonymous with

that of innocent passage frequently referred to by the first British delegate, who spoke of 'la liberté de traverser en temps de guerre comme en temps de paix les eaux territoriales.'

Between February 14 and 16 the *Altmark* passed through about 400 miles of Norwegian territorial waters; had her voyage not been interrupted the total length of her passage would have probably amounted to 600 miles. It was also alleged by the British Government that the Norwegian authorities showed special consideration to the *Altmark* in permitting her to pass through the 'Bergen defended area' which belligerent warships were forbidden to enter under the Norwegian Neutrality Regulations. And see below, p. 561, n. 1, as to the permitted time of passage in the case of the *City of Flint*.

<sup>1</sup> Normally, diplomatic representations and a claim for compensation are the proper remedy for any disregard of neutral duties of this nature. However, circumstances may arise in which subsequent redress by the neutral must, *in natura rerum*, be wholly inadequate and in which the aggrieved belligerent must, therefore, be held to be justified in resorting to self-help. This will be so particularly in cases in which the importance of political or strategic interests involved, or, as in the case of the *Altmark*, considerations of humanity, render such action imperative. See also as to the *Altmark* case, § 345 (n.). And see Borchard in *A.J.*, xxxiv. (1940) pp. 289-294.

to demand, passage for belligerent warships in time of war upon its rivers, of whatever kind they may be. Rivers, whether 'national' or 'boundary,' or 'multi-national' or 'international,' form parts of the territory of the riparian State or States,<sup>1</sup> and passage upon such portions of them as belong to neutral States must be denied to the warships of belligerents in time of war. But it is possible that the provisions of a treaty of sufficiently general and law-making character might modify this rule.<sup>2</sup>

§ 325b. The question of the passage of belligerent men-of-war through natural straits consisting of the territorial waters of a neutral State is not free from doubt. Two aspects of the matter must be distinguished :—(1) Has a belligerent a right to claim passage for its men-of-war ? To this, it seems, the author's answer would be : Yes, in the case of such straits as form part of the highways for international traffic by connecting two open seas<sup>3</sup> ; and No, in the case of other straits. (2) May the neutral littoral State permit passage to the men-of-war of a belligerent without compromising its neutrality ? To this, it seems, the answer is : Yes, in the case of such straits as connect two open seas, and provided that it acts impartially towards all the belligerents in a particular war. This view is supported by a passage in the judgment of the Permanent Court of International Justice in the case of the *Wimbledon*, where the Court refers to 'the general opinion according to which, when an artificial waterway connecting

(iii)  
Through  
Natural  
Straits.

<sup>1</sup> See vol. i. § 176, where the author uses the term 'not-national' rivers for what are here described as 'multi-national.' See Westlake, i. p. 148.

<sup>2</sup> See Roxburgh, *International Conventions and Third States* (1917), § 59. As to the Scheldt see Fauchille, § 527 (with bibliography); Maeterlinck and Bisschop in *Grotius Society*, iv. (1919) pp. 253-295. As to the Elbe see Article 49 of the Statute of Navigation of 1922, *British Treaty Series*, 1923, No. 3; *A.J.*, xvii. (1923), Suppl., p. 239. For the details of the denunciation by Germany in 1936 of the relevant provisions of the Treaty of Versailles see above, vol. i. § 178a and Genet, § 411.

<sup>3</sup> See above, vol. i. §§ 188, 195, 449; and see Higgins, pp. 407-468. As to the Danish Straits see Smith, *Great Britain and the Law of Nations*, ii. (1935) pp. 262-272; Brüel in *Z.I.*, xxxviii. (1928) pp. 188-196 and the same, *Die dänische Bightsperre 1914-1918 und ihre völkerrechtliche Bedeutung* (1938), and in *Hague Recueil*, 55 (1936) (i.), pp. 652-664; Favilli in *R.I.*, 3rd ser., xvii. (1936) pp. 633-644. On the new Danish bridge, opened on May 14, 1935, over the Little Belt and on the question whether the building of it is compatible with the right of passage of war-vessels see Brüel in *Z.V.*, xix. (1937) pp. 327-332 and in *Acta Scandinavica*, vi. (1935) pp. 142-154.

two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.<sup>1</sup>

With regard to straits not connecting two open seas, it is believed that the analogy of the maritime belt must be followed, and that the neutral State may, but is not compelled to, deny passage to belligerent warships in time of war.

The position of straits regulated by conventions depends in some degree upon any special provisions governing the matter<sup>2</sup>; but it is difficult to see how such a convention can affect the rights of States not parties to it, except, perhaps, when it is of a very general and law-making character.<sup>3</sup>

(iv)  
Through  
Artificial  
Straits,  
i.e.  
Canals.

§ 325c. Canals, being artificially constructed waterways, are parts of the territories of the States through which they run, and, unless they have been subjected to international regulation, must be treated in the same way as a national river; that is, the neutral riparian State must deny passage to belligerent warships in time of war. By treaty, however, the Suez<sup>4</sup> and Panama<sup>5</sup> Canals have been assimilated to international waterways, and, when the riparian State is neutral, belligerents may claim for their warships a right of

<sup>1</sup> Publications of the Court, Series A, No. 1, at p. 28. See also Higgins, p. 468, and his summary in Hall, § 42; and *Annuaire*, xiii. p. 328. As to the Straits of Magellan see Smith, *op. cit.*, pp. 259-262.

<sup>2</sup> As to the Dardanelles, the Sea of Marmora, and the Bosphorus, see the Straits Convention annexed to the Treaty of Lausanne of July 24, 1923, British Treaty Series, No. 16 (1923), Cmd. 1929; *A.J.*, xviii. (1924), Suppl., pp. 53-62; and see above, vol. i. § 197. See also Mandelstamm in *Hague Recueil*, 47 (1934) (i.), pp. 762-771; Genet, §§ 422-424.

<sup>3</sup> See Rolin, § 1080.

<sup>4</sup> See vol. i. § 183. See also Article 8 of the Treaty of Alliance of August 26, 1936, between Great Britain and

Egypt: Treaty Series No. 6 (1937), Cmd. 5360.

<sup>5</sup> See vol. i. § 184. In the Executive Order of September 1939 prescribing regulations governing the passage and control of vessels through the Panama Canal in wars in which the United States are neutral, it was provided that a public vessel of a belligerent or neutral State shall be permitted to pass through the Canal only after her commanding officer has given a written assurance to the authorities of the Canal that 'the rules, regulations, and treaties of the United States will be faithfully observed': *A.J.*, xxxiv. (1940), Suppl., p. 32. And see *ibid.*, pp. 28-36, for other orders and regulations of the United States relating to the Canal.

passage, the exercise of which is not regarded as incompatible with the neutrality of the riparian State.<sup>1</sup>

§ 326. In contradistinction to the practice of the eighteenth century,<sup>2</sup> the duty of impartiality must nowadays prevent a neutral from permitting belligerents to occupy a neutral fortress, or any other part of neutral territory. Even if a treaty previously entered into stipulates such occupation, it cannot be granted without violation of neutrality.<sup>3</sup> On the contrary, the neutral must even use force to prevent belligerents from occupying any part of his neutral territory.<sup>4</sup> The question whether such occupation on the part of a belligerent would be excusable in case of extreme necessity, in self-defence, on account of the neutral's inability to prevent the other belligerent from making use of the neutral territory as a base for his military operations, must, it is believed, be answered in the affirmative, since an extreme case of necessity in the interest of self-defence must be considered as an excuse.<sup>5</sup> But necessity of this kind and degree exists only when the use of the territory by the enemy is imminent; it is not sufficient that a belligerent should merely fear that his enemy might perhaps attempt so to use it.

Occupation of Neutral Territory by Belligerents.

§ 327. It has long been universally recognised that the duty of impartiality must prevent a neutral from permitting

Prize Courts on Neutral Territory.

<sup>1</sup> In the case of the Suez Canal the right of passage applied even to the warships of States at war with Turkey, the former territorial sovereign. *Quaere*, must Egypt now be substituted? In the case of the Panama Canal there is no such provision for the possible belligerency of the United States. As to the Kiel Canal see vol. i. § 183a. After Germany had, in November 1936, denounced Article 380 of the Treaty of Versailles relating to the freedom of passage through the Kiel Canal the German naval authorities issued in January 1937 an announcement to the effect that foreign men-of-war, in order to pass through the Canal, must previously obtain permission through diplomatic channels. See Maupas in *R.I. (Paris)*, xx. (1937) pp. 49-63; Genet, § 416. In 1916, during the World War, while Greece was neutral, a French transport passed through

the Corinth Canal with Serbian troops on board: see Fauchille, § 1460. And see Scholz, *Die Rechtsverhältnisse der Meerengen und interozeanischen Kanäle im Kriege* (1936); Genet, §§ 412-416.

<sup>2</sup> See Kleen, i. § 116.

<sup>3</sup> See Klüber, § 281, who asserts the contrary.

<sup>4</sup> As to the occupation of parts of Greek territory during the World War see above, § 320 (n.).

<sup>5</sup> See Vattel, iii. § 122; Bluntschli, § 782; Calvo, iv. § 2642. Kleen, i. § 116, seems not to recognise as an excuse an extreme necessity of the kind mentioned above. There is a difference between this case and the case which arose at the outbreak of the Russo-Japanese War, when both belligerents invaded Korea, for, as was explained above in § 320 (n.), Korea and Manchuria fell within the region of war.



a belligerent to set up Prize Courts on neutral territory. The intention of a belligerent in so doing can only be to facilitate the plundering by his men-of-war of the commerce of the enemy; a neutral tolerating such Prize Courts would, therefore, indirectly assist the belligerent in his naval operations. During the eighteenth century, however, it was not considered illegitimate for neutrals to allow the setting up of Prize Courts on their territory. But after the United States of America in 1793 closed down the French Prize Courts set up by the French envoy Genêt on her territory,<sup>1</sup> it became recognised that such Prize Courts are inconsistent with the duty of impartiality incumbent upon a neutral, and Article 4 of Convention XIII. so enacts.]

Belli-  
gerent's  
Prizes in  
Neutral  
Ports.

§ 328. It would, no doubt, be an indirect assistance to the naval operations of a belligerent if a neutral allowed him to organise on neutral territory the safe custody or sale of prizes.<sup>2</sup>

But the case of a temporary stay of a belligerent man-of-war with her prize in a neutral port is different. Neutral Powers may—although most maritime States no longer do—allow prizes to be brought temporarily into their ports.<sup>3</sup> Articles 21 and 22 of Convention XIII. lay down the following rules: A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions; it must leave as soon as the circumstances which justified its entry are at an end, and if it does not, the neutral Power must order it to leave at once, and must, in case of disobedience, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew; a prize brought into a neutral port for reasons other than unseaworthiness, stress of weather, or

<sup>1</sup> See above, § 291 (1).

<sup>2</sup> See the Dutch case *Bouman v. The State of the Netherlands*, *Annual Digest*, 1919-1922, Case No. 348, where it was held that it is the duty of the neutral State not to admit into free traffic within its territory ships and goods acquired in consequence of acts of war, such as capture or requisition in occupied enemy territory.

<sup>3</sup> See Trainé, *Das Gastrecht im Seekrieg* (1912), § 20; Scott in *A.J.*, x. (1916) pp. 104-112; Stael-Holstein in *R.I.*, 3rd ser., v. (1924) pp. 241-251; Hyde, ii. § 861; *Harvard Research* (1939), pp. 446-458; Genet, §§ 445-450; see also some of the literature cited at head of § 342 below. As to shelter sought by prizes in territorial waters see below, § 333 (n.).

want of fuel or provisions—for instance, to avoid recapture—must forthwith be released by the neutral Power. Article 22 does not mention that in such a case the prize crew must be interned, but there is no doubt that they must be.<sup>1</sup>

The further question is whether a prize, whose unseaworthiness is so great that it cannot be repaired, may be allowed to remain in the neutral port, and be there sold<sup>2</sup> after the competent Prize Court has condemned it. Since Article 21 enacts that an admitted prize must leave the neutral port as soon as the circumstances which justified its entry are at an end, there is no doubt that it may remain if it cannot be repaired so as to be made seaworthy. There ought, consequently, to be no objection to its sale in the neutral port, provided it has previously been condemned by the proper Prize Court.

While Article 21 is free from objection, Article 23 of Convention XIII. is of a very doubtful character.<sup>3</sup> It enacts that a neutral Power may allow prizes to enter its ports, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court; and the restrictions imposed by Article 21 do not apply to prizes brought into a neutral port under Article 23. It would in practice enable a belligerent to safeguard all his prizes against recapture, and a neutral Power which allowed belligerent prizes access to its ports under it would indirectly

<sup>1</sup> The United States interned the prize crew in the case of the *Appam*. See below, § 328a. When the *City of Flint*, an American vessel with a German prize crew on board, entered the Russian port of Murmansk on October 23, 1939, the Russian authorities, after having found that the crew did not invoke any of the reasons justifying the entry of a prize, interned the prize crew and were about to release the vessel. Two days later the Russian authorities reversed their decision on the ground that the vessel had entered because of unseaworthiness on account of engine trouble. The vessel then left Murmansk with the German prize crew in charge. On November 3 the *City of Flint* was released and the prize crew interned

by the Norwegian authorities after the vessel had entered a Norwegian port notwithstanding the fact that the Norwegian Government, in the absence of reasons laid down in Articles 21 and 22 of the Convention, had refused her permission to enter. The wording of the Convention does not make quite clear the position in the case of entry not warranted by the terms of the Convention. Does the duty to intern the prize crew and release the ship become operative immediately, or is it conditional upon the refusal of the ship to leave? For comment on the case of the *City of Flint* see Hyde in *A.J.*, xxxiv. (1940) pp. 88-95.

<sup>2</sup> See Kleen, i. § 115.

<sup>3</sup> See Rolin, §§ 1105-1110.

render assistance to the naval operations of the belligerent concerned. For this reason, Great Britain, Japan, and Siam, and also the United States of America when she acceded to the Convention in December 1909, entered a reservation against Article 23.

The Case  
of the  
*Appam*:

§ 328a. On several occasions during the World War German cruisers brought their prizes into neutral ports. Thus in March 1915 the German cruiser *Prinz Eitel Friedrich* conducted a French prize into a Chilean port, and at other times German war-vessels took the captured steamers *Valentine*, *Helicon*, *Sacramento*, and *Jean* into Chilean harbours. These acts were the subject of various protests.<sup>1</sup> But the case which attracted most attention was that of the *Appam*. This British liner was captured by a German war-vessel off the coast of Africa, and was navigated across the Atlantic by a prize crew, unaccompanied by the captor, to the then neutral American port of Newport News. The American Government thereupon liberated the ship's crew and passengers and interned the prize crew, and the owners of the vessel instituted proceedings in the American courts for her release. The court of first instance held that Articles 21 and 22 of Hague Convention XIII.<sup>2</sup> (which has not been ratified by Great Britain) were declaratory of existing rules of International Law, under which neutral ports might not become places of asylum or permanent rendez-vous for belligerent prizes; that the *Appam* had been brought to the United States for reasons other than unseaworthiness, stress of weather, or want of fuel or provisions, and must be set free. The Supreme Court affirmed this decision.<sup>3</sup>

<sup>1</sup> See Garner, ii. § 566; Alvarez, *La grande guerre européenne* (1915), pp. 231-244, 266-269.

<sup>2</sup> See above, § 328.

<sup>3</sup> (1917) 243 U.S. 124; Scott, *Cases*, 858; Garner, ii. § 567. See also Scott in *A.J.*, x. (1916) pp. 809-831; Coudert in *A.J.*, xi. (1917) pp. 270-314; the documents in *A.J.*,

x. (1916), Special Suppl., pp. 387-403, and xi. (1917) pp. 443-453; Bellot in *Grotius Society*, ii. (1917) pp. 11-19; Horn in *Strupp, Wört.*, i. pp. 59-61; Meurer, *Das Gastrecht der Schiffe im Krieg und Frieden* (1918), pp. 37-40. See also *The Sudmark* [1917] A.C. 620; 2 B. and C.P.C. 473.

### III

#### NEUTRALS AND WARLIKE PREPARATIONS

Hall, §§ 217-218, 221-225—Lawrence, §§ 234-240—Westlake, ii. pp. 210-227—Manning, pp. 227-244—Phillimore, iii. §§ 142-151*b*—Twiss, ii. §§ 223-225—Taylor, §§ 616, 619, 626-628—Walker, §§ 62-66—Wharton, iii. §§ 392, 395-396—Wheaton, §§ 436-439—Holland, *Lectures*, pp. 449-489—Keith's Wheaton, pp. 967-992—Moore, vii. §§ 1293-1305—Heffter, §§ 148-150—Geffcken in *Holtzendorff*, iv. pp. 658-660, 676-684—Ullmann, § 191—Fauchille, §§ 1458-1459, 1463 (17)-1463 (18), 1465-1469—Despagnet, Nos. 692-693—Rivier, ii. pp. 395-408—Calvo, iv. §§ 2619-2627—Fiore, iii. Nos. 1551-1570—Kleen, i. §§ 76-89, 114—Mérignhac, iii<sup>a</sup>. pp. 522-547—Pillet, pp. 288-290—Dupuis, Nos. 322-331, and *Guerre*, Nos. 290-294—Hyde, ii. §§ 849-856, 863, 870, 873, 882-883—Rolin, §§ 1082-1116—Genet, §§ 426-444—Hatschek, pp. 326-334—Cruchaga, §§ 1189-1205—*Land Warfare*, §§ 472-476—Einicke, *Rechte und Pflichten der neutralen Mächte im Seekrieg* (1912), pp. 71-153—Wehberg, § 11—Alvarez, *La grande guerre européenne* (1915), pp. 155-295—*Harvard Research* (1939), pp. 249-263, 337-340, 469-487—Peydière, *Du séjour et des droits des navires de guerre belligérants* (1936).

§ 329. Although, according to the present intense conception of the duty of impartiality, neutrals need not <sup>1</sup> prohibit their subjects from supplying belligerents with arms and the like in the ordinary way of trade, a neutral must <sup>2</sup> prohibit belligerents from erecting, and maintaining on his territory, depots and factories of arms, ammunition, and military provisions. However, belligerents can easily evade this rule by not keeping depots and factories, but contracting with subjects of the neutral concerned in the ordinary way of trade for the supply of arms, ammunition, and provisions.<sup>3</sup>

§ 330. In former centuries neutrals were not required to prevent belligerents from levying troops on their neutral territories; indeed, a neutral often himself levied troops on his territory for belligerents without thereby violating his duty of impartiality as understood in these times. In this way the Swiss Confederation frequently used to furnish belligerents, and often both parties, with thousands of recruits, although she herself always remained neutral. But

<sup>1</sup> See below, § 350.

<sup>2</sup> See Bluntschli, § 777, and Kleen, i. § 114.

<sup>3</sup> The distinction made by some writers between an occasional supply

by subjects of neutrals and an organised supply in large proportions, and the assertion that the latter must be prohibited by the neutral State, is not justified. See below, § 350.

Depots  
and Fac-  
tories on  
Neutral  
Territory

Levy of  
Troops,  
and the  
like.

at the end of the eighteenth century a movement was started which tended to change this practice. In 1793 President Washington of the United States of America interdicted the levy of troops for belligerents on American territory, and by and by many other States followed the example. During the nineteenth century the majority of writers maintained that the duty of impartiality must prevent a neutral from allowing the levy of troops; and the few<sup>1</sup> writers who differed made it a condition that a neutral, if he allowed it at all, must allow it to both belligerents alike. The controversy was settled by Articles 4 and 5 of Hague Convention V., which lay down the rules that corps of combatants may not be formed, nor recruiting offices opened, on the territory of a neutral Power, and that neutral Powers must not allow these acts.<sup>2</sup>

The duty of impartiality must likewise prevent a neutral from allowing a belligerent man-of-war reduced in her crew to enrol sailors in his ports, with the exception of such few men as are absolutely necessary to navigate the vessel to the nearest home port.<sup>3</sup>

Akin to the levy of troops on neutral territory was the granting of letters of marque to vessels belonging to the merchant marine of neutrals. Since privateering has disappeared, the question whether neutrals must prohibit their subjects from accepting letters of marque from a belligerent<sup>4</sup> need not be discussed.

Passage  
of Bodies  
of Men  
intending  
to Enlist.

§ 331. A neutral is not obliged by his duty of impartiality to prohibit passage through his territory of men who intend to enlist, whether they pass singly or in numbers. Thus, in 1870, Switzerland did not object to Frenchmen travelling through Geneva for the purpose of reaching French corps, or to Germans travelling through Basle for the purpose of reaching German corps, on condition, however, that these

<sup>1</sup> See, for instance, Twiss, ii. § 225, and Bluntschli, § 762.

<sup>2</sup> In February 1940 Great Britain permitted the setting up of a recruiting office in London to assist in the enlistment of volunteers for the Finnish army in connection with the Russo-Finnish War. This was done

in pursuance of the provisions of the Covenant of the League of Nations. See above, p. 507.

<sup>3</sup> See Article 18 of Convention XIII.; and below, § 333 (3) and § 346.

<sup>4</sup> See above, § 83.

men travelled without arms and uniform. { On the other hand, when France during the Franco-German War organised an office <sup>1</sup> in Basle for the purpose of sending bodies of Alsatian volunteers through Switzerland to the south of France, Switzerland correctly closed it down because this *official* organisation of the passage of whole bodies of volunteers through her neutral territory was more or less equal to a passage of troops. }

The Second Hague Conference sanctioned this distinction, for Article 6 of Convention V. enacts that 'the responsibility of a neutral Power is not involved by the mere fact that persons cross the frontier individually (*isolément*) in order to offer their services to one of the belligerents.' An *argumentum e contrario* justifies the conclusion that the responsibility of a neutral is involved in case it allows men to cross the frontier *in a body* in order to enlist in the forces of a belligerent.<sup>2</sup>

§ 332. Since the levy and passage of troops, and the formation of corps of combatants, must be prevented by a neutral, *a fortiori* he is required to prevent the organisation of a hostile expedition from his territory against either belligerent.<sup>3</sup> This takes place when a band of men combine under a commander for the purpose of starting from the neutral territory and joining the belligerent forces. The case, however, is different if a number of individuals, not organised into a body under a commander, start in company from a neutral State for the purpose of enlisting with one of the belligerents.<sup>4</sup>

Organisa-  
tion of  
Hostile  
Expedi-  
tions.

<sup>1</sup> See Bluntschli, § 770.

<sup>2</sup> But see Article 23 of the Habana Convention on Maritime Neutrality of 1928 (see above, § 68), which lays down as follows: 'Neutral States shall not oppose the voluntary departure of nationals of belligerent States even though they may leave simultaneously in great numbers; but they may oppose the voluntary departure of their own nationals going to enlist in the armed forces.'

In the General Declaration of Neutrality of the American Republics of October 3, 1939, the latter resolved to prevent on their respective terri-

tories the enlistment of persons to serve in the forces of the belligerents or the inducing of persons to leave<sup>3</sup> their territories for the purpose of taking part in belligerent operations: *International Conciliation*, 1940, No. 356, p. 19.

<sup>3</sup> As to the *Terceira* affair in 1827 see Lawrence, § 231; Pitt Cobbett, *Leading Cases*, ii. 438; and Phillimore, iii. §§ 166-167.

<sup>4</sup> Thus in 1870, during the Franco-German War, 1200 Frenchmen started from New York in two French steamers for the purpose of joining the French Army. Although the

Use of  
Neutral  
Territory  
as Base of  
Naval  
Opera-  
tions.

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§ 333. Although a neutral is not required by his duty of impartiality to prohibit<sup>1</sup> the passage of belligerent men-of-war<sup>2</sup> through his maritime belt, or to prohibit the temporary stay of such vessels in his ports, it is universally recognised that he must not allow vessels admitted therein to make the neutral maritime belt and neutral ports the base of their naval operations against the enemy.<sup>3</sup> Thus Article 5 of Hague Convention XIII. enacts that 'belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries.' The following rule may be formulated as emanating from this principle :

(1) A neutral must, so far as in his power, prevent belligerent men-of-war<sup>4</sup> from cruising within his portion of the

vessels carried also 96,000 rifles and 11,000,000 cartridges, the United States did not interfere, since the men were not organised in a body, and the arms and ammunition were carried in the way of ordinary commerce. See Hall, § 222, and Curtis in *A.J.*, viii. (1914) pp. 1-37, 224-255. As to the activities of consuls and emissaries of the belligerents in neutral territory see Bouffanais, *Les consuls en temps de guerres et de troubles* (1933), pp. 85-129. See also Rousseau in *R.G.*, xl. (1933) pp. 314-317. And see the case of the *Lehigh Valley Railroad Company and Others* decided in October 1930 by the Mixed Claims Commission between the United States and Germany: *A.J.*, xxv. (1931) pp. 147-168. It was admitted in this case by Germany that the German Foreign Office specifically authorised the German Embassy at Washington to commit acts of sabotage in the United States in pursuance of the policy to destroy and damage the property of States at war with Germany. The Commission found, however, that the German diplomatic representatives 'did nothing in the way of exercising this particular authority.' In 1933 the Commission decided to reopen the case on the ground that the decision of 1930 had been obtained by fraud, collusion, and suppression of evidence (see above, p. 27). In 1939 the Commission rendered a series of decisions establishing the direct re-

sponsibility of German representatives and awarding damages to the amount of \$50,000,000.

<sup>1</sup> See Curtius, *Des navires de guerre dans les eaux neutres* (1907); *Harvard Research* (1939), pp. 421-425.

<sup>2</sup> As regards submarine vessels see below, § 344a.

<sup>3</sup> See Trainé, *Das Gastrecht im Seekrieg* (1912). As to the use of neutral waters for the purpose of avoiding capture see below, § 333 (8).

<sup>4</sup> The rules laid down in Convention XIII. with regard to men-of-war apply also to vessels assimilated to men-of-war, i.e. vessels used as transports or fleet auxiliaries or in any other way for the purpose of prosecuting or aiding hostilities. It is true that the relevant articles of Hague Convention XIII. speak only of 'belligerent men-of-war,' and do not mention vessels assimilated thereto. But paragraphs 3 and 4 of the Preamble state that 'it is not possible at present to concert measures applicable to all circumstances which may arise in practice,' and that 'in cases not covered by the present convention account must be taken of the general principles of the Law of Nations.' Without doubt, therefore, its stipulations concerning belligerent vessels of war apply to auxiliary vessels. In December 1939 the German merchant-vessel *Tacoma* acted under the orders of the *Graf Spee*, a German battleship (see above, p. 210). She was interned at the beginning of January 1940

maritime belt for the purpose of capturing enemy vessels as soon as they leave it. However, a neutral is only required to do all that lies in his power. It is absolutely impossible to prevent such cruising under all circumstances and conditions, especially in the case of neutrals who own possessions in distant parts of the globe.

(2) A neutral must prevent a belligerent man-of-war from leaving a neutral port at the same time as an enemy man-of-war or an enemy merchantman, or must make other arrangements which prevent an attack so soon as both reach the open sea.<sup>1</sup> Thus Article 16 of Hague Convention XIII. enacts :

‘ When warships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other. The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible. A belligerent warship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant-ship flying the flag of its adversary.’

(3) A neutral must prevent a belligerent man-of-war, whose crew is reduced from any cause whatever, from enrolling sailors in his neutral ports, with the exception of such

after she had failed to comply with the order of the Uruguayan Government to leave Uruguay within a specified period.

There has, in general, been a tendency to treat belligerent ships as auxiliary vessels not only on account of their formal status as such, e.g. in accordance with the provisions of the Hague Convention No. VII. (see above, § 84), but also in all cases in which they render assistance to the belligerent naval forces. Thus, for instance, the Argentine Decree of September 4, 1939, laid down that belligerent commercial vessels which transfer fuel to their warships or which change their route as originally declared in pursuance of the Decree in a manner creating the suspicion that their voyage did not serve purely

commercial purposes shall be treated as auxiliary vessels. A further Decree of September 26, 1939, provided that foreign merchant-vessels failing to comply with the regulations concerning the use of radio apparatus by foreign merchant-vessels (see above, § 356) shall be treated as auxiliary vessels. See also the Resolution of the Inter-American Neutrality Committee (see above, p. 504) of February 2, 1940, concerning vessels used as auxiliary transports of warships. The Resolution recommended that any assistance given by a belligerent merchant-vessel to a warship shall have the effect of constituting that merchant-ship an auxiliary vessel of war: *A.J.*, xxxiv. (1940), Suppl., p. 81.

<sup>1</sup> See below, § 347 (1).



few hands as are necessary to navigate the vessel safely to the nearest port of her home State.<sup>1</sup>

(4) A neutral must prevent belligerent men-of-war admitted to his ports or maritime belt from taking in such a quantity of provisions and coal as would enable them to continue their naval operations; for otherwise he would make it possible for them to cruise on the open sea near his maritime belt for the purpose of attacking enemy vessels.

There is, however, no unanimity among the Powers concerning the quantity of provisions and coal which belligerent men-of-war may be allowed to take in. Articles 19 and 20 of Hague Convention XIII. enact the following:

Article 19: 'Belligerent warships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard. Similarly, these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country.<sup>2</sup> They may, on the other hand, fill up their

<sup>1</sup> See Article 18 of Convention XIII.; and above, § 330.

<sup>2</sup> As the amount of fuel necessary to enable a British or German war-vessel in a Chilean port to reach the nearest British or German port was sufficient to enable it to carry on hostilities in the Atlantic or the Pacific for a long period, Chile found great difficulty during the World War in reconciling this article with the obligation to prevent British or German war-vessels from taking in such quantities of coal as would enable them to continue their operations. See Garner, ii. § 561; Alvarez, *La grande guerre européenne*, pp. 201-206. The Habana Convention of 1928 on Maritime Neutrality (see above, § 68) provides, in Article 10, that belligerent warships may supply themselves with fuel and stores under the conditions especially established by the local authority, and only when there are no local rules on the subject may they 'supply themselves in the manner prescribed for provisioning in time of peace.' Article 12 applies the provisions of the Conventions as to sojourns and supplying

and provisioning of warships to auxiliary ships and to enemy and neutral merchantmen closely associated with naval operations, e.g. by being entirely freight-loaded by the belligerent or by being actually and exclusively employed for transporting enemy troops or for the transmission of information on behalf of the belligerent, or by being an armed merchantman. The Scandinavian Neutrality Rules of 1938 (see above, p. 183) lay down that warships of the belligerents may take aboard only such a quantity of fuel as is necessary to enable them to reach the nearest port of their own country, but that in no case may they take more fuel than is necessary for completely filling their own bunkers or their liquid fuel tanks (Article 5 (4)). The same Rules provide that belligerents must not establish fuel depots either on neutral territory or on board vessels stationed in neutral territorial waters (Article 14). Some States (see, e.g., the Argentine Decree of September 4, 1939) limit the amount of fuel allowed to merchant-vessels, but this is merely a measure calculated to preserve national resources.

bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied. If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the duration of their permitted stay is extended by twenty-four hours.'

Article 20 : ' Belligerent warships which have shipped fuel in a port belonging to a neutral Power may not, within the succeeding three months, replenish their supply in a port of the same Power.'

But Great Britain, which upholds the rule that belligerent warships must not take in more provisions and fuel in neutral ports than is necessary to bring them safely to the nearest port of their own country, together with Japan and Siam, reserved against Article 19 ; and Germany reserved against Article 20. Therefore the matter is not settled.

It is agreed, however, that it makes no difference whether the man-of-war intends to buy provisions and coal on land or to take them in from transport vessels which accompany or meet her in neutral waters.

(5) A neutral must prevent belligerent men-of-war admitted into his ports or maritime belt from replenishing their ammunition and armaments, and from adding to their armaments, as otherwise he would indirectly assist them in preparing for hostilities (Article 18 of Convention XIII.). It makes no difference whether the ammunition and armaments are to come from the shore, or are to be taken in from transport vessels.

Similarly, although a neutral may allow the repair of slight damage, he must prevent belligerent men-of-war in his ports from carrying out such repairs as would add to their fighting force. He may not, therefore, allow extensive repairs necessary to render crippled war-vessels again fit for action. Article 17 of Hague Convention XIII. formally embodied this distinction by providing that ' in neutral ports and roadsteads belligerent warships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their

fighting force.' The local authorities must decide what repairs are necessary, and such repairs must be carried out with the least possible delay.<sup>1</sup>

Accordingly, in February 1913, during the Balkan War, the Turkish cruiser *Hamidieh* was allowed to remain two days in the harbour of Malta to repair slight damage caused by stress of weather, and then permitted to leave. During the World War, the German cruisers *Prinz Eitel Friedrich* and *Kronprinz Wilhelm*, and the German gunboat *Geier* and her naval tender *Locksun*, which entered neutral American ports for repairs, were allowed only a limited time within which to execute them, and as they failed to depart within the prescribed period they were interned and dismantled until the end of the war.<sup>2</sup>

(6) A neutral must prevent belligerent men - of - war admitted to his ports from remaining there longer than is necessary for ordinary and legitimate purposes. It could not be said at the outbreak of the World War that the rule adopted in 1862<sup>3</sup> by Great Britain, and followed by some other maritime States, not to allow a longer stay than twenty-four hours, was a rule of International Law. It was left to the discretion of neutrals to adopt by their Municipal Law

<sup>1</sup> May one say that a neutral State may sanction such repairs as are needed to make a belligerent warship seaworthy, but not such further repairs as may be needed to make her 'fightworthy'? The Habana Convention of 1928 on Maritime Neutrality (see above, § 68) provides, in Article 9, that damage which is found to have been caused by the enemy's fire shall in no case be repaired. For a survey of the practice see *Harvard Research* (1939), pp. 470-472. When in December 1939 the *Graf Spee*, a German armoured ship, entered the Uruguayan port of Montevideo after having been damaged in a battle with three British cruisers, the Uruguayan authorities allowed her seventy-two hours for executing repairs. This followed the report of a technical commission to the effect that provisional repairs necessary to make the ship seaworthy could be carried out within that period. At the end of that period the *Graf Spee*

left the port and scuttled herself at the entrance to the harbour. The German Government protested on the ground that the time given was insufficient. On the other hand, the British Government had previously insisted that Article 17 did not allow the repairing of damage sustained in combat and that the period of stay should not, therefore, exceed twenty-four hours (see the Uruguayan Blue Book concerning the *Graf Spee* and the *Tacoma*, 1940, p. 31).

<sup>2</sup> See Garner, ii. § 563; *A.J.*, ix. (1915) p. 486; Hall, § 231 (n.). During the World War the question also arose whether slight damage might be repaired, even though it was caused, not by weather, but by hostile action in battle. As Article 17 of Convention XIII. draws no distinction between damage by weather and damage in battle, Holland decided to permit such repairs.

<sup>3</sup> See Hall, § 231.

any rule they thought fit, so long as the admitted men-of-war did not prolong their stay for other than ordinary and legitimate purposes. Article 12 of Convention XIII. confirmed this arrangement by prescribing the twenty-four hours rule only for those neutral countries which had no special provisions to the contrary in their Municipal Laws.<sup>1</sup> In fact, however, during the World War, most, if not all, neutral States adopted the twenty-four hours rule.<sup>2</sup>

It is agreed—and Article 14 of Convention XIII. enacts it—that belligerent men-of-war, except those for the time exclusively devoted to religious, scientific, or philanthropic purposes, must not prolong their stay in neutral ports and waters beyond the time permitted, except on account of damage<sup>3</sup> or stress of weather. A neutral would certainly violate his duty of impartiality if he were to allow belligerent men-of-war to winter in his ports, or to stay there for the purpose of waiting for other vessels of the fleet or transports.<sup>4</sup>

(7) A neutral must prevent more than three men-of-war<sup>1</sup> belonging to the same belligerent from being simultaneously in one of his ports or roadsteads unless his Municipal Law provides the contrary (Article 15 of Convention XIII.).

(8) Belligerent men-of-war must not shelter in a neutral port for an undue length of time in order to escape capture.<sup>5</sup>

<sup>1</sup> Germany, Domingo, Siam, and Persia entered a reservation against Article 12.

<sup>2</sup> See Garner, ii. § 563, and *A.J.*, x. (1916), Suppl., pp. 121-178, where the regulations of several States governing the admission of belligerent men-of-war to their ports are collected.

<sup>3</sup> The Scandinavian Neutrality Rules of 1938 (see above, p. 183) provide in Article 4 that no extension of stay beyond twenty-four hours shall be permitted if it is clear that the vessel cannot be rendered navigable within a reasonable delay or if the damage has been caused by enemy action.

<sup>4</sup> The rule that a neutral must prevent belligerent men-of-war from staying too long in his ports or waters became of considerable importance during the Russo-Japanese War, when the Russian Baltic Fleet was

on its way to the Far East. Admiral Rostjestsvensky is said to have stayed in the French territorial waters of Madagascar from December 1904 till March 1905, for the purpose of awaiting there a part of the Baltic Fleet that had set out at a later date.

<sup>5</sup> See below, § 347 (4). The same applies probably to sheltering within territorial waters. In November 1939, in the case of the *City of Flint* (see above, p. 561), Norway treated the prize captured by the Germans in the same way as a man-of-war in the matter of passage through Norwegian territorial waters. The *City of Flint* was given permission to proceed inside the territorial waters of Norway for twenty-four hours after leaving the Norwegian port of Tromsø. Germany denied that the twenty-four hours limit established by the Hague Convention applied to prizes.

(9) At the outbreak of war, a neutral must warn all belligerent men-of-war then in his ports, roadsteads, or territorial waters to depart within twenty-four hours, or such other time as the local law prescribes (Article 13 of Convention XIII.).<sup>1</sup>

Defen-  
sively  
Armed  
Merchant-  
men in  
Neutral  
Ports.

§ 333a. With regard to vessels, the principle that neutral ports and waters must not be allowed to be made the basis of naval operations and preparations applies, in the nature of things, only to men-of-war (including submarines) and to auxiliary war-vessels.<sup>2</sup> It can have no application to merchant-vessels armed exclusively for their defence. The difficulties created by the necessity of arming merchantmen have been indicated above as showing the desirability of a conventional regulation of the problems raised by the advent of submarine and aerial warfare in regard to enemy commerce.<sup>3</sup> But these difficulties, it has been pointed out, exist only in the relations of the belligerents as the result of the fact that it is difficult for the submarine or the aircraft to ascertain in time the fact and the character of the armament of the merchant-vessel. That difficulty seems altogether irrelevant in relation to the authorities of the neutral port to which the merchant-vessel seeks admission. These are under no imperative necessity to ascertain, at their peril, the nature and purpose of the armaments of the merchant-vessel. There seems therefore to be no valid reason, dictated by International Law, for departing from the established practice under which defensively armed merchantmen may be admitted to neutral ports on the same conditions as other merchant-vessels so long as there is no conclusive proof that the particular vessel has used her armaments for the purposes of attack. During the World War all States, with the exception of Holland, adhered to that rule. It was affirmed in 1938 by the Scandinavian States in their Neutrality Rules.<sup>4</sup> Article 3

<sup>1</sup> Germany reserved against Article 13.

<sup>2</sup> See above, § 84. As to aircraft see below, § 335a.

<sup>3</sup> See above, § 181a.

<sup>4</sup> Thus, for instance, Article 3 of

the Danish Rules lays down that access to Danish ports or territorial waters is prohibited to armed merchant-vessels 'if the armament is destined to ends other than their own defence.'

of the Habana Convention of 1928<sup>1</sup> adopted a rule assimilating armed merchantmen to men-of-war. However, the United States and Cuba, in ratifying the Treaty, refused to be bound by that article. Up to the end of 1938 only Ecuador, the Dominican Republic, Bolivia, Nicaragua, and Panama had ratified the Convention as including Article 3.<sup>2</sup> At the beginning of the war in 1939 Holland abandoned the attitude assumed during the World War, and in her proclamation of neutrality announced the intention of admitting merchantmen carrying defensive armament not exceeding certain limits.<sup>3</sup> And the American Republics, in their General Declaration of Neutrality of October 3, 1939, expressly disclaimed the intention to assimilate to warships belligerent merchant-vessels armed for defensive purposes.<sup>4</sup>

§ 334. Whereas a neutral is in no<sup>5</sup> wise obliged by his duty of impartiality to prevent his subjects from selling armed vessels to the belligerents, such armed vessels being merely contraband of war, a neutral is bound to employ the means at his disposal to prevent his subjects from building, fitting out, or arming, to the order of either belligerent, vessels intended to be used as men-of-war, and to prevent the departure from his jurisdiction of any vessel which, by order of either belligerent, has been adapted to warlike use.<sup>6</sup> The difference between selling armed vessels to belligerents

Building and Fitting-out of Vessels intended for Naval Operations.

<sup>1</sup> See above, § 68.

<sup>2</sup> See on this question Hyde, ii. § 863; Garner, i. §§ 246-249; Alvarez, *La grande guerre européenne*, pp. 257-260; Scott in *A.J.*, x. (1916) pp. 113-116; *Harvard Research* (1939), pp. 435-446.

<sup>3</sup> Printed in *R.I.*, 3rd ser., xx. (1939) p. 588.

<sup>4</sup> This was subject to the condition that they do not carry more than four six-inch guns mounted on the stern, that their lateral decks are not reinforced, and that there are no circumstances showing that they can be used for offensive purposes: *International Conciliation*, January 1940, No. 356, p. 21; *A.J.*, xxxiv. (1940), Suppl., p. 11. The required proof of

the defensive nature of the armament of the vessel is variously fixed in various countries. Thus the Brazilian Neutrality Decree of September 2, 1939, laid down that the ship shall not have torpedo ejector tubes; that the calibre of its guns shall not exceed six inches; and that it shall have only a small quantity of arms and munitions, a normal crew and 'a cargo consisting of articles not intended for warfare' (Article 25). For a requirement of even more detailed evidence see the Cuban Decree of September 1, 1939 (Article 12).

<sup>5</sup> See below, §§ 350, 397.

<sup>6</sup> See Article 8 of Convention XIII.; and the case of the *Somers* in 1898: Lawrence, § 236.

and building them to order is usually defined in the following way :

An armed ship, being contraband of war, is in no wise different from other kinds of contraband, provided that she is not manned in a neutral port, so that she can commit hostilities at once after having reached the open sea. A subject of a neutral who builds an armed ship, or arms a merchantmen, not to the order of a belligerent, but intending to sell her to a belligerent, does not differ from a manufacturer of arms who intends to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, and to deliver them to belligerents, either in a neutral port or in a belligerent port. In the cases of the *La Santissima Trinidad*<sup>1</sup> (1822) and *The Meteor*<sup>2</sup> (1866), American courts have recognised this<sup>3</sup>; and so did the unratified Declaration of London, which in Article 22(10) enumerated as absolute contraband 'warships, including boats, and their distinctive component parts.'

On the other hand, if a subject of a neutral builds armed ships to the order of a belligerent, he prepares the means of naval operations, since the ships, on sailing outside the neutral territorial waters and taking in a crew and ammunition, can at once commit hostilities. Thus, through the carrying out of the order of the belligerent, the neutral territory has been made the base of naval operations; and as the duty of impartiality includes an obligation to prevent either belligerent from making neutral territory the base of military or naval operations, a neutral violates his neutrality by not preventing his subjects from carrying out an order of a belligerent for the building and fitting out of men-of-war. This distinction, although of course logically correct, is hair-splitting. But as neutral States need not prevent their subjects from supplying<sup>4</sup> arms and ammunition to belligerents, it will probably continue to be drawn.

<sup>1</sup> 7 Wheaton, p. 340.

<sup>2</sup> See Phillimore, iii. § 151b; Wharton, iii. § 396, p. 561.

<sup>3</sup> See Phillimore, iii. § 151b, and Hall, § 224; but see Wehberg, pp.

411-413, who asserts that neutrals must prevent their subjects from selling armed vessels to belligerents.

<sup>4</sup> See below, § 350.

However this may be, submarines are in the same category as surface vessels, and when, in 1914 during the World War, one of the Allied Powers ordered a number of submarines to be built by a firm in the United States, the American Government was of opinion that they could not permit the carrying out of the contract.<sup>1</sup>

§ 335. The movement for recognition of the fact that the duty of impartiality requires a neutral to prevent his subjects from building and fitting out to order of belligerent vessels intended for naval operations was considerably strengthened as the result of the well-known case of the *Alabama*. In 1862,<sup>2</sup> during the American Civil War, the attention of the British Government was drawn by the Government of the United States to the fact that a vessel, for warlike purposes was being built in England to the order of the insurgents. This vessel, afterwards called the *Alabama*, left Liverpool in July 1862 unarmed, but was met at the Azores by three other vessels, also coming from England, which supplied her with guns and ammunition, so that she could at once begin to prey upon the merchantmen of the United States. On the conclusion of the Civil War, the United States claimed damages from Great Britain for the losses sustained through the operations of the *Alabama* and other vessels likewise built in England. Negotiations went on for several years, and finally, on May 8, 1871, the parties entered into the Treaty of Washington<sup>3</sup> for the purpose of having their difference settled by arbitration, Great Britain, the United States, Brazil, Italy, and Switzerland each choosing one arbitrator. The Treaty contained three rules, since

The *Alabama* Case and the Three Rules of Washington.

<sup>1</sup> See *A.J.*, ix. (1915) pp. 177-187. See Hatschek, p. 333, for an account of the Belloni case. On the outbreak of the World War a submarine was being built at Spezia for Russia; Belloni succeeded in removing the submarine and handing it over to France; he was tried by an Italian court and acquitted, there being no Italian law which made his action an offence.

<sup>2</sup> For details see Bernard, *Neutrality of Great Britain during the American Civil War* (1870), pp. 338-496; Geffcken, *Die Alabama Frage*

(1872); Pradier-Fodéré, *La question de l'Alabama* (1872); Caleb Cushing, *Le Traité de Washington* (1874); Bluntschli in *R.I.*, ii. (1870) pp. 452-485; Balch, *The Alabama Question* (1900), and *L'évolution de l'arbitrage international* (1908), pp. 43-70; Westlake in the *Cambridge Modern History*, xii. pp. 16-22; Lapradelle et Politis, *Recueil des arbitrages internationaux*, ii. (1924) pp. 713-983; Reale, *Le règlement judiciaire du conflit de l'Alabama* (1929); Bourquin in *Hague Recueil*, 1927 (i.), pp. 236-240.

<sup>3</sup> Martens, *N.R.G.*, xx. p. 698.



then known as 'The Three Rules of Washington,' to be binding upon the arbitrators, namely <sup>1</sup>:

'A neutral Government is bound—

'*Firstly*. To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a Power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part, within such jurisdiction, to warlike use.

'*Secondly*. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

'*Thirdly*. To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violations of the foregoing obligations and duties.'

In consenting that these rules should be binding upon the arbitrators, Great Britain expressly declared that in her view these rules were not recognised rules of International Law at the time when the case of the *Alabama* occurred, but the Treaty contained a stipulation that the parties 'agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them.'

The arbitrators <sup>2</sup> met at Geneva in 1871, held thirty-two conferences there, and gave their award <sup>3</sup> on September 14, 1872, according to which Great Britain had to pay 15,500,000 dollars damages to the United States.

The arbitrators put a construction upon the term '*due diligence*,' <sup>4</sup> and asserted other opinions in their award, which are very much contested, and to which Great Britain never consented. Though Great Britain and the United States agreed upon the Three Rules, they did not at all agree upon their interpretation, and could not agree upon the contents of the communication to other maritime States stipulated by

<sup>1</sup> See Moore, vii. § 1330.

<sup>2</sup> See Moore, *Arbitrations*, i. pp. 495-682.

Moore, *Arbitrations*, i. pp. 653-659, and in Phillimore, iii. § 151a.

<sup>3</sup> The award is printed in full in

<sup>4</sup> See below, § 363.

the Treaty of Washington. It ought not, therefore, to be said that the Three Rules of Washington<sup>1</sup> have literally become universal rules of International Law. Nevertheless, they were the starting-point of the movement for the universal recognition of the fact that the duty of impartiality obliges neutrals to prevent their subjects from building and fitting out, to the order of belligerents, vessels intended for warlike purposes, and to prevent the departure from their jurisdiction of any vessel which, by order of a belligerent, has been adapted to warlike use. Article 8 of Hague Convention XIII. copies almost verbally the first of the Three Rules of Washington, but with the important difference that it replaces the words 'to use due diligence' by the words 'to employ the means at its disposal.' For this reason the construction put by the Geneva arbitrators upon the term *due diligence* is not applicable to Article 8, the question whether a neutral employed the means at his disposal being a mere question of fact.<sup>2</sup>

§ 335a. The reasons underlying the Washington Rules and the corresponding provisions of the Hague Convention apply with special cogency to aircraft leaving neutral territory and belonging to or ordered by a belligerent. Such aircraft, if ready for warlike use immediately on its leaving neutral territory, constitutes, because of its potentialities for offensive action, an even graver danger for the opposing belligerent than vessels leaving neutral territory; neither is it a danger which threatens only such belligerents as possess a sea coast or substantial sea-borne commerce. For this reason the provisions of the Hague Air Warfare Rules on the matter are more stringent than those of Article VIII. of Hague Convention No. XIII. While Article 45 of the Hague Rules

The  
Washington Rules  
and  
Aircraft.

<sup>1</sup> As regards the seven rules adopted by the Institute of International Law, at its meeting at The Hague in 1875, as emanating from the Three Rules of Washington, see *Annuaire*, i. (1877) p. 139. And see above, § 311, as to the Foreign Enlistment Acts prior and subsequent to the Treaty of Washington.

<sup>2</sup> See, however, Lapradelle et Politis, *op. cit.*, ii. pp. 971-972, on the

reconciliation of the Washington and the Hague Convention tests. For a case during the World War see Ariga, *La Chine et la grande guerre* (1920), pp. 111-115, who mentions two German warships in a Chinese port sold on the outbreak of war to a private purchaser as merchant-vessels and thereafter kept under supervision by the Chinese Government.

affirms the rule that a neutral State is not bound to prevent the export of aircraft for belligerents, Article 46 lays down that a neutral Government is bound to use the means at its disposal ' (1) to prevent the departure from its jurisdiction of any aircraft in a condition to make a hostile attack against a belligerent Power, or carrying or accompanied by appliances or materials the mounting or utilisation of which would enable it to make a hostile attack, if there is reason to believe that such aircraft is destined for use against a belligerent Power ; (2) to prevent the departure of any aircraft the personnel of which belongs to the combatant forces of a belligerent Power.' It is also laid down that the neutral must effectively prescribe a route for the aircraft despatched at the order of a belligerent so as to avoid the neighbourhood of the military operations of the opposing belligerent.

While the first paragraph of Article 46 seems to be in accordance with the corresponding rule in maritime warfare,<sup>1</sup> the other two provisions appear to constitute a refinement which adds to the difficulties of enforcement on the part of the neutral and which is probably unnecessary so long as the neutral acts in good faith upon the principle which the Article as a whole is intended to embody. That principle, properly interpreted, imposes upon the neutral State the duty to prevent the departure of aircraft of which *both* equipment and armaments are such as to enable it to engage in warlike operations or in services of a military character before reaching the territory of the belligerent for whom it is destined. On the other hand, any deviation from that principle might well result in the neutral territory becoming a starting-point for hostile expeditions endangering the safety of the belligerent in such a way as to constitute a clear violation of neutral duties.<sup>2</sup>

<sup>1</sup> But see Spaight, *Air*, p. 462. And see *ibid.*, pp. 457-463, for a lucid discussion of the question.

<sup>2</sup> The Scandinavian Neutrality Rules of 1938 (see above, p. 183) provide that any aircraft in a condition to commit an attack against a belligerent, or which carries appa-

ratus or material the mounting or utilisation of which would enable it to attack, is forbidden to leave neutral territory if there is reason to assume that it is intended to be employed against the other belligerent (Article 15). See also *Harvard Research* (1939), pp. 770-772.

#### IV

#### NEUTRAL ASYLUM TO LAND FORCES, WAR MATERIAL, AND AIRMEN

Vattel, iii. §§ 132-133—Hall, §§ 226, 230—Taylor, § 621—Wharton, iii. § 394—Moore, vii. §§ 1314-1318—Bluntschli, §§ 774, 776-776a, 785—Heffter, § 149—Geffcken in *Holtzendorff*, iv. pp. 662-665—Ullmann, § 191—Fauchille, §§ 1461-1462 (6)—Rivier, ii. pp. 395-398—Calvo, iv. §§ 2668-2669—Fiore, iii. Nos. 1576, 1582, 1583—Martens, ii. § 133—Mérignhac, iii<sup>a</sup>. pp. 577-586—Pillet, pp. 286-287—Kleen, ii. §§ 151-157—Holland, *War*, Nos. 131-133—Zorn, pp. 316-352—Heilborn, *Rechte*, pp. 12-83—Garner, i. §§ 301-307—Rolin, §§ 1007-1031—Wijnveld, *Neutraliteitsrecht te Land* (1917), pp. 59-105—Hyde, ii. § 866—Spaight, *Air*, p. 427—*Land Warfare*, §§ 485-501—Rolin-Jaequemyns in *R.I.*, iii. (1871) pp. 352-366.

§ 336. Neutral territory, being outside the region of war,<sup>1</sup> On offers an asylum to members of belligerent forces, to the Neutral Asylum in subjects of the belligerents and their property, and to war general. material belonging to the belligerents. Since, according to the present rules of International Law, the duty of either belligerent to treat neutrals according to their impartiality must—the case of extreme necessity in self-defence excepted—prevent them from violating the territorial supremacy of neutrals, enemy persons and goods are perfectly safe on neutral territory. It is true that neither belligerent has a right to demand from a neutral<sup>2</sup> such asylum for his subjects, their property, and his State property. But neither has he any right to demand that a neutral should refuse it to the enemy. The territorial supremacy of the neutral enables him to use his discretion in granting or refusing asylum. However, his duty of impartiality must compel him, if he grants it, to take all such measures as are necessary to prevent his territory from being used as a base of hostile operations.

Neutral territory may be an asylum (1) for private property, (2) for public enemy property, especially war material, cash, and provisions, (3) for private subjects of the enemy,

<sup>1</sup> See above, §§ 70, 71.

<sup>2</sup> The generally recognised usage by which a neutral grants temporary

hospitality in his ports to vessels of either belligerent in distress is an exception discussed below in § 344.

(4) for enemy land forces, (5) for enemy airmen, and (6) for enemy naval forces. Details, however, need only be given with regard to asylum to land forces, war material,<sup>1</sup> and airmen, and to naval forces.<sup>2</sup> For with regard to private property and private subjects it need only be mentioned that private war material brought into neutral territory stands on the same footing as public war material of a belligerent brought there, and, further, that private enemy subjects are safe on neutral territory<sup>3</sup> even if they are claimed by a belligerent as having committed war crimes.

As regards asylum to land forces, a distinction must be made between (1) prisoners of war, (2) single fugitive soldiers, and (3) troops, or whole armies, pursued by the enemy, and thereby induced to take refuge on neutral territory.

Neutral  
Territory  
and  
Prisoners  
of War.

§ 337. Neutral territory is an asylum to prisoners of war of either belligerent ; they become free <sup>4</sup> *ipso facto* by coming into neutral territory, whether they have escaped from a place of detention and taken refuge on neutral territory, or whether they are brought as prisoners into neutral territory by enemy troops who themselves take refuge there.<sup>5</sup> This principle has been generally recognised for centuries.<sup>6</sup>

But has the neutral on whose territory a prisoner has taken refuge the duty to retain him and thereby prevent him from rejoining his own army ? Formerly this question was not

<sup>1</sup> §§ 337-341a.

<sup>2</sup> §§ 342-348b.

<sup>3</sup> For the action of the Dutch Government in the case of the former German Emperor see above, § 253 (n.).

<sup>4</sup> Thus when, in November 1917, a Russian prisoner who had escaped from a German prison camp in Schleswig was shot before reaching the Danish frontier but succeeded in crossing it, and two German soldiers went over and dragged him back to German territory, Germany apologised for the violation of Danish territory, and declared that she would not have hesitated to transfer the prisoner to the Danish authorities if he had not meanwhile died.

See the London *Times* newspaper, February 16, 1917.

<sup>5</sup> The case of prisoners on board a belligerent man-of-war which enters a neutral port is different ; see below, § 345.

<sup>6</sup> An illustration occurred in 1588, when several Turkish and Barbary captives escaped from one of the galleys of the Spanish Armada which was wrecked near Calais ; although the Spanish ambassador claimed them, France considered them to be freed by coming on her territory, and sent them to Constantinople. See Hall, § 226. See also Fauchille, § 1462 (2), citing a Chinese neutrality decree of August 6, 1914.

settled. In 1870, during the Franco-German War, Belgium believed that it had such a duty, and detained a French non-commissioned officer who had been a prisoner in Germany and had escaped into Belgian territory with the intention of rejoining the French forces at once. Doubts were expressed upon this case,<sup>1</sup> but all writers agreed that it was different if escaped prisoners wanted to remain on the neutral territory ; as they might at any subsequent time wish to rejoin their own forces, the neutral was considered to be obliged by his duty of impartiality to take adequate measures to prevent their so doing. There was likewise no unanimity as to whether prisoners brought into neutral territory by enemy forces taking refuge there could be detained in case they intended at once to leave the neutral territory. Some writers<sup>2</sup> maintained that they could not ; others asserted that they might always be detained, and had to comply with such measures as the neutral considered necessary to prevent them from rejoining their forces.<sup>3</sup>

Article 13 of Hague Convention V. settled the controversy by enacting that a neutral who receives prisoners of war who have escaped, or who are brought there by troops of the enemy taking refuge on neutral territory, shall leave them at liberty ; but that, if he allows them to remain on his territory, he *may*—he need not—assign them a place of residence so as to prevent them from rejoining their forces. Since, therefore, everything is left to the discretion of the neutral, he has to take into account the merits and needs of every case and to take such steps as he thinks adequate ; a belligerent certainly cannot, as of right, call upon the neutral to detain them.

The case of unwounded prisoners who, with the consent of the neutral, are transported through neutral territory is different. Such prisoners do not become free on entering the neutral territory ; but there is no doubt that a neutral, by consenting to the transport, violates his duty of impar-

<sup>1</sup> See Rolin-Jaequemyns in *R.I.*, iii. (1871) p. 355 ; Bluntschli, § 776 ; Heilborn, *Rechte*, pp. 32-34.

<sup>2</sup> For instance, Heilborn, *Rechte*, pp. 51-52.

<sup>3</sup> See Sauser-Hall in *R.G.*, xix. (1912) pp. 40-57, where this case, and the cases previously mentioned, are discussed.

tiality, because it is equivalent to passage of troops through neutral territory (Article 2 of Convention V.).

Different again is the case where enemy soldiers are amongst the wounded whom a belligerent is allowed by a neutral to transport through neutral territory. Such wounded prisoners become free, but they must, according to Article 14 of Convention V., be guarded by the neutral, so as to ensure that they do not again take part in military operations.<sup>1</sup>

Fugitive  
Soldiers  
and De-  
serters on  
Neutral  
Territory.

§ 338. A neutral may grant asylum to single soldiers of belligerents who take refuge on his territory, although he need not do so, but may at once send them back. If he grants such asylum, his duty of impartiality obliges him to disarm them, and to take such measures as are necessary to prevent them from rejoining their forces. But it is in practice impossible for a neutral to be so watchful as to detect every single fugitive who enters his territory. It will always happen that such fugitives steal into neutral territory and leave it again later on to rejoin their forces without the neutral being responsible. Moreover, before he can incur responsibility for not doing so, a neutral must actually be in a position to detain such fugitives. Thus Luxemburg, during the Franco-German War, could not prevent hundreds of French soldiers, who fled into her territory after the capitulation of Metz, from rejoining the French forces, because it was a condition,<sup>2</sup> of her neutralisation that she should not keep an army, and therefore, in contradistinction to Switzerland, was unable to mobilise troops for the purpose of fulfilling her duty of impartiality.

Different from the case of fugitive soldiers is the case of fugitive deserters. If they desert and cross the neutral territory for the purpose of joining the enemy, their case is hardly different from the case of men who pass through a neutral territory, intending to enlist in the army of a belligerent.<sup>3</sup> For this reason they need not be interned if they come *individually*<sup>4</sup>; but they must be interned if they come *in a*

<sup>1</sup> See also Article 15 of Convention X., and below, § 348a.

<sup>2</sup> See above, vol. i. § 100.

<sup>3</sup> See above, § 331.

<sup>4</sup> This rule does not apply to belligerent aircraft which must in every case be interned. See Spaight, *Air*, pp. 425, 426.

*body*. On the other hand, if they desert without any such intention, they need not be interned, even though they come in a *body*.<sup>1</sup>

§ 339. On occasions during war large bodies of troops, or even a whole army, are obliged to cross the neutral frontier for the purpose of escaping captivity.<sup>2</sup> A neutral need not permit this, and may repulse them on the spot ; but he may also grant asylum. It is, however, obvious that the presence of such troops on neutral territory is a danger to the other party. The duty of impartiality incumbent upon a neutral obliges him, therefore, to disarm them at once, and to guard them so as to ensure that they do not again perform military acts against the enemy during the war. In this case Hague Convention V. enacts the following rules :

Neutral  
Territory  
and  
Fugitive  
Troops.

Article 11 : ' A neutral Power which receives in its territory troops belonging to the belligerent armies shall detain them, if possible, at some distance from the theatre of war. It may keep them in camps, and even confine them in fortresses or localities assigned for the purpose. It shall decide whether officers are to be left at liberty on giving their parole<sup>3</sup> that they will not leave the neutral territory without authorisation.'

Article 12 : ' In the absence of a special convention, the neutral Power shall supply the interned with the food, clothing, and relief which the dictates of humanity prescribe. At the conclusion of peace, the expenses caused by internment shall be made good.'

It is usual for troops who are not actually pursued by the enemy—if pursued, they have no time to do it—to enter through their commander into a convention with the representative of the neutral concerned, stipulating the conditions upon which they cross the frontier and give themselves into his custody. Such conventions are valid without ratification, provided that they contain only such stipulations as

<sup>1</sup> On the practice of Holland and Switzerland during the World War see Fauchille, § 1462 (5). See also the Recommendation of the Inter-American Neutrality Committee (see above, p. 504) of January 26, 1940, on the principles governing internment: *A.J.*, xxxiv. (1940), Suppl., p. 76.

<sup>2</sup> On the question of the internment of fugitive insurgents see Rolin, §§ 1028-1030.

<sup>3</sup> See *The Times* newspaper of December 28, 1939, for the report of the escape of an interned British officer from Luxemburg after he had withdrawn his parole some days before.



do not disagree with International Law, and concerns only the requirements of the case.

Although the detained troops are not prisoners of war captured by the neutral, they are nevertheless in his custody, and therefore under his disciplinary power, just as prisoners of war are under the disciplinary power of the State which keeps them in captivity. They do not enjoy the extritoriality<sup>1</sup> due to armed forces abroad, because they are disarmed. As the neutral is required to prevent them from escaping, he must apply stern measures, and he may punish severely every member of the detained force who attempts to frustrate such measures, or does not comply with the disciplinary rules regarding order, sanitation, and the like.

The most remarkable instance known in history is the asylum granted by Switzerland during the Franco-German War to a French army of about 82,000 men with 10,000 horses, which crossed the frontier on February 1, 1871.<sup>2</sup> France had, after the conclusion of the war, to pay about eleven million francs for the maintenance of this army in Switzerland during the rest of the war.

Other instances occurred during the World War, when after the fall of Antwerp in 1914 Holland interned British troops which crossed into Holland, south of the River Scheldt, to escape the German Army, and when the local authorities in Spanish New Guinea interned 900 Germans and 14,000 natives who crossed the Spanish frontier from German Cameroon. When Germany and Russia invaded Poland in 1939, Lithuania, Hungary, and Roumania interned considerable Polish forces which crossed the frontiers of these countries.

Neutral  
Territory  
and  
non-Com-  
batant  
Members  
of Belli-  
gerent  
Forces.

§ 340. The duty of impartiality incumbent upon a neutral obliges him to detain in the same way as soldiers non-combatant<sup>3</sup> members of belligerent forces who cross his frontier. He may not, however, detain army surgeons and other non-combatants who are privileged according to Article 9 of the Geneva Convention.<sup>4</sup>

Neutral  
Territory  
and War  
Material  
of Belli-  
gerents.

§ 341. It can happen during war that war material belong-

<sup>1</sup> See above, vol. i. § 445.

<sup>2</sup> See the convention regarding this asylum between the Swiss General Herzog and the French General Clin-

chant in Martens, *N.R.G.*, xix. p. 639.

<sup>3</sup> See Heilborn, *Rechte*, pp. 43-46. Convention V. does not mention this.

<sup>4</sup> See above, § 121.

ing to one of the belligerents is brought into neutral territory for the purpose of saving it from capture by the enemy. It may be brought by troops crossing the neutral frontier to evade captivity, or it may be purposely sent there by order of a commander. Now, a neutral is by no means obliged to admit such material, just as he is not obliged to admit soldiers of belligerents. But if he does, his duty of impartiality obliges him to seize and retain it till after the conclusion of peace. War material includes arms, ammunition, provisions, horses, means of military transport (such as carts and the like), and everything else that belongs to the equipment of troops. But means of military transport are war material only so far as they are the property of a belligerent. If they are hired, or requisitioned, from private individuals, they may not be detained by the neutral.

It can likewise happen during war that war material which was originally the property of one of the belligerents, but later had been seized and appropriated by the enemy, is brought by the latter into neutral territory. Does such material, through coming into neutral territory, become free, and must it be restored to its original owner? Or must it be retained by the neutral, and after the war be restored to the belligerent who brought it into the neutral territory? On the analogy of prisoners of war who become free through being brought into neutral territory, it is maintained<sup>1</sup> that such war material becomes free, and must be restored to its original owner. This view, however, cannot be accepted.<sup>2</sup> Since war material through seizure by the enemy becomes his property, and remains his property unless the other party re-seizes and thereby re-appropriates it, there is no reason for it to revert to its original owner upon being brought into neutral territory.<sup>3</sup>

<sup>1</sup> See Hall, § 226.

<sup>2</sup> See Heilborn, *Rechte*, p. 60, and *Land Warfare*, § 492. The Dutch Government at the Second Hague Conference proposed a rule according to which captured war material brought by the captor into neutral territory should be restored, after the war, to its original owner, but—see *Deuxième Conférence, Actes*, i.

p. 145—this proposal was not accepted.

<sup>3</sup> See Heilborn, *Rechte*, pp. 61-65, where the question is discussed whether a neutral may claim a lien on war material brought into his territory for expenses incurred for the maintenance of detained troops belonging to the owner of the war material.

Neutral  
Territory  
and Belligerent  
Aircraft  
and Personnel.

§ 341a. The almost invariable practice of neutral States during the World War, coupled with the general acquiescence of belligerents, may be said to have established two customary rules: firstly, that belligerent aircraft must not enter the air space over neutral territory in time of war; and, secondly, that if they do, either intentionally or inadvertently, and are compelled to land, the neutral State must intern them.<sup>1</sup> Moreover, when belligerent aircraft passed over neutral territory without intending to land, they were fired at for the purpose of compelling them to do so.<sup>2</sup> This practice forms the basis of certain of the proposed Air Warfare Rules of 1923, which, however, have not yet been adopted<sup>3</sup>:

Article 40: 'Belligerent military aircraft are forbidden to enter the jurisdiction of a neutral State.'<sup>4</sup>

Article 42: 'A neutral Government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft, and to compel them to alight if they have entered such jurisdiction.'

'A neutral Government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any.'

During the World War the personnel of belligerent aircraft rescued on the open sea by neutral merchantmen and brought into neutral territory were treated as shipwrecked soldiers and not interned.<sup>5</sup> Article 43 of the proposed Air Warfare Rules of 1923 provides that

'The personnel of a disabled belligerent military aircraft rescued

<sup>1</sup> See Spaight, *Air*, pp. 421-450. See also generally on neutrality in air warfare Hackwitz, *Die Neutralität im Luftkriegsrecht* (1927); Meyer, *Das Neutralitätsrecht im Luftkriegsrecht* (1931); Sandiford in *R.G.*, xxxix. (1932) pp. 739-775; *Harvard Research* (1939), pp. 758-775; Zondag, *Neutraliteit in de Lucht* (1940). According to the Scandinavian Rules of Neutrality of 1938 (see above, p. 183), while military aircraft of the belligerents must not enter neutral territory (including, it must be assumed, neutral territorial waters and air space), the prohibition does not apply to aerial ambulances

and to aircraft on board warships. Such aircraft must not leave the warships so long as they are in neutral waters (Article 8).

<sup>2</sup> See the details given by Garner, i. §§ 301-303.

<sup>3</sup> See above, § 214d.

<sup>4</sup> But see Article 16 of the Habana Convention of 1928 on Maritime Neutrality (see above, § 68), which provides that 'the airships of belligerents shall not fly above the territory or the territorial waters of neutrals' only 'if it is not in conformity with the regulations of the latter.'

<sup>5</sup> See below, § 343a.

outside neutral waters and brought into the jurisdiction of a neutral State by a neutral military aircraft<sup>1</sup> and there landed, shall be interned.<sup>2</sup>

## V

### NEUTRAL ASYLUM TO NAVAL FORCES AND SHIP- WRECKED WAR MATERIAL

Vattel, iii. § 132—Hall, § 231—Westlake, ii. pp. 234-242—Twiss, ii. § 222—Taylor, §§ 635, 636, 640—Wharton, iii. § 394—Wheaton, § 434—Moore, vii. §§ 1314-1317—Bluntschli, §§ 775-776b—Heffter, § 149—Geffcken in *Holtzendorff*, iv. pp. 665-667, 674—Ullmann, § 191—Fauchille, §§ 1463 (2)-1463 (26)—Despagnet, No. 692 *ter*—Rivier, ii. p. 405—Calvo, iv. §§ 2669-2684—Fiore, iii. Nos. 1576-1581, 1584, and *Code*, Nos. 1811-1815—Martens, ii. § 133—Kleen, ii. § 155—Pillet, pp. 305-307—Perels, § 39, p. 213—Testa, pp. 173-187—Dupuis, Nos. 308-314, and *Guerre*, Nos. 304-328—Ortolan, ii. pp. 247-291—Hautefeuille, i. pp. 344-405—Takahashi, pp. 418-484—Garner, ii. §§ 561-564—Hyde, ii. §§ 857-865—Keith's Wheaton, pp. 952-964, 993-1008—Liszt, § 67—Cruchaga, §§ 1225-1242—Gemma, pp. 369-372—Rolin, §§ 1077-1100, 1118-1123—De Louter, ii. pp. 436-449—Trainé, *Das Gastrecht im Seekrieg* (1912), §§ 14-20—Einicke, *Rechte und Pflichten der neutralen Mächte im Seekrieg* (1912), pp. 153-325—Pepys, *Les problèmes soulevés par l'asile maritime en temps de guerre* (1913), and in *R.G.*, xx. (1913) pp. 574-599—Meurer, *Das Gastrecht der Schiffe im Krieg und Frieden* (1918)—Willms-Bonn, *Die seekriegsrechtliche Bedeutung von Flottenstützpunkten* (1918)—Kessler, *Le droit d'asile dans la guerre maritime* (1920)—Wehberg, § 11—Bajer in *R.I.*, 2nd ser., ii. (1900) pp. 242-247—Lapradelle in *R.G.*, xi. (1904) pp. 531-564—*Harvard Research* (1939), pp. 425-446.

§ 342. Whereas it is a condition of the granting of asylum by a neutral to land forces, and single members of them, that he should disarm them and detain them for the purpose of preventing them from joining in further military operations, a neutral may grant temporary asylum to men-of-war of<sup>3</sup> belligerents without being obliged to disarm and detain

Asylum  
to Naval  
Forces in  
contra-  
distinc-  
tion to  
Asylum  
to Land  
Forces.

<sup>1</sup> Italics the editor's.

<sup>2</sup> See summary in Spaight, *Air*, pp. 445-446, of the rules for the treatment of belligerent military airmen entering neutral territory in a variety of circumstances other than the normal case of being mounted in their own aircraft.

<sup>3</sup> What is said here with regard to neutral asylum to men-of-war of belligerents applies also to such of

their vessels as are assimilated to men-of-war; see above, § 333. As to sea-planes see Spaight, *Air*, p. 430 and *Harvard Research* (1939), p. 223. As to aircraft-carriers see Kroell in *R.G.D.A.*, iv. (1935) pp. 7-18. The Italian War Regulations of 1938 lay down that aircraft on board a belligerent man-of-war, including aircraft-carriers, must be regarded as forming part of the ship (Article 28).

them.<sup>1</sup> This is so, whether belligerent men-of-war seek neutral asylum because they are chased into neutral waters by the enemy,<sup>2</sup> or from other causes. The reason is that the sea is considered to be an international highway, that the ports of all nations serve more or less the interests of international traffic on the sea, and that the conditions of navigation make it necessary to extend a certain hospitality in ports to vessels of all nations. Thus the rules of International Law regarding asylum in neutral ports to men-of-war of belligerents have developed on somewhat different lines from the rules regarding asylum to land forces. But the rule, that the duty of impartiality incumbent upon a neutral must prevent him from allowing belligerents to use his territory as a base of operations of war, is nevertheless valid regarding asylum granted to their men-of-war.

Neutral  
Asylum  
to Naval  
Forces  
optional.

§ 343. Although a neutral may grant asylum to belligerent men-of-war in his ports, he has no duty to do so.<sup>3</sup> He may prohibit all belligerent men-of-war from entering any of his ports, whether these vessels are pursued by the enemy, or desire to enter for other reasons. However, his duty of impartiality must prevent him from denying to one party what he grants to the other; he may not, therefore, allow men-of-war of one belligerent to enter his ports and exclude men-of-war of the other belligerent (Article 9 of Convention XIII.). Neutrals, as a rule, admit men-of-war of both parties, often, however, excluding them from certain ports. Thus, during the Crimean War, Austria prohibited all belligerent men-of-war from entering the port of Cattaro. Thus, further, Great Britain during the American Civil War closed to all belligerent men-of-war the ports of the Bahama Islands, stress of weather excepted.

Be that as it may, since a neutral must prevent belligerents from making his territory the base of military opera-

<sup>1</sup> See, however, below, § 347, concerning the abuse of asylum, which must be prohibited.

<sup>2</sup> But this is not universally admitted; see, for instance, Kleen, ii. pp. 29-31. The point has not been settled by Convention XIII.

<sup>3</sup> As to a belligerent's prizes in

neutral ports see above, § 328. As to the right of asylum of merchant-vessels which, although used by the fleet of the belligerent, remain privately operated for private profit, see the decision of Parker, Arbitrator, of March 1929, in *The Kronprinz Wilhelm and Other Vessels: Annual Digest*, 1929-1930, Case No. 300.

tions, he must not, as has already been explained,<sup>1</sup> allow an unlimited number of men-of-war belonging to one of the belligerents to stay simultaneously in one of his ports.

§ 344. To the rule that a neutral need not admit men-of-war of the belligerents to his ports there is no exception in strict law. However, there is an international usage that belligerent men-of-war in distress should never be prevented from making for the nearest port. In accordance with this usage, vessels in distress have always been allowed to enter even such neutral ports as are closed to belligerent men-of-war. There are even instances known of belligerent men-of-war in distress having asked for, and been granted, asylum by the enemy in an enemy port.<sup>2</sup>

Asylum to  
Naval  
Forces in  
Distress.



§ 344a. During the World War the question arose whether submarine vessels forming part of the belligerent forces should have the same status as other men-of-war, and therefore be granted temporary asylum in neutral ports. In August 1916 the Allies proposed to neutral Powers that no asylum should be granted to belligerent submarine vessels of any description. They argued<sup>3</sup> that in their case the application of the principles of the Law of Nations was affected by special and novel conditions: (1) submarines could navigate and remain at sea submerged, and thus escape all control and observation; (2) it was impossible to identify them and to establish their national character, whether neutral or belligerent, combatant or non-combatant, and to remove the capacity for harm inherent in their nature; (3) any place which provided a submarine war-vessel far from its base with opportunity for rest and replenishment of its supplies thereby furnished such an addition to its powers that the place became in fact, through the advantages it gave, a base of naval operations.

Asylum  
to Sub-  
marine  
Vessels.

However, no agreement was reached upon this proposal of the Allies, the various neutral Powers acting differently. Thus, while the United States of America rejected it, and admitted the German submarine war-vessel U 53 to the

<sup>1</sup> See above, § 333 (7).

<sup>2</sup> See above, § 189. As to asylum for warships employed exclusively in scientific or humanitarian missions see

*Harvard Research* (1939), pp. 430-432.

<sup>3</sup> Parl. Papers, Misc. No. 33 (1916), Cmd. 8349. See Reeves in *A.J.*, xi. (1917) p. 147, and Hall, § 231a.

American harbour of Newport,<sup>1</sup> Norway by a decree of October 13, 1916,<sup>2</sup> forbade all belligerent submarine war-vessels from entering Norwegian territorial waters, except in case of *force majeure*. Sweden by a decree of July 19, 1916, and Holland by its declaration of neutrality of August 4, 1914, had adopted a similar policy. Spain by a decree of June 29, 1917, prohibited all belligerent submarines from entering Spanish waters and ports, from whatever cause.<sup>3</sup> The Scandinavian Neutrality Rules of 1938 expressly provide for their exclusion.<sup>4</sup> On November 4, 1939, in pursuance of an authorisation of the Neutrality Act of that day, the President of the United States issued a Proclamation making it unlawful for belligerent submarines to enter the ports or territorial waters of the United States except in case of *force majeure* and subject to the condition that the entry and departure must be effected by navigation on the surface.<sup>5</sup> Practically all neutral States followed the same practice.<sup>6</sup>

Exterri-  
toriality  
of Men-of-  
War  
during  
Asylum.

§ 345. The exterritoriality which, according to a universally recognised rule of International Law, men-of-war enjoy<sup>7</sup> in foreign ports, obtains even in time of war during their stay in neutral ports. Therefore, for example, prisoners of war on board do not become free by coming into the neutral port,<sup>8</sup> so long as they are not brought on shore. On

<sup>1</sup> Garner, ii. § 564. As to the *Deutschland*, a commercial submarine, see Garner, ii. § 565.

<sup>2</sup> 44 *Clunet* (1917), p. 322.

<sup>3</sup> See generally Fauchille, § 1463 (21); Renault, *Le sous-marin et sa situation dans le droit des gens* (1932), pp. 166-190; *Harvard Research* (1939), pp. 432-435. As to Holland see Van Eysinga in *Grotius Society*, xviii. (1933) pp. 74-76. See also Perrinjaquet in *R.G.*, xxiv. (1917) pp. 226-237 and the Recommendation of the Inter-American Neutrality Committee (see above, p. 504) of February 2, 1940: *A.J.*, xxxiv. (1940), Suppl., p. 78. When in September 1939 the British Government received information to the effect that Germany might attempt to establish submarine and air bases on the coasts of Central and South American countries, the British representatives in those countries were instructed to invite the Governments

to which they were accredited to take the necessary steps to prevent any breaches of neutrality.

<sup>4</sup> *A.J.*, xxxii. (1938), Suppl., p. 159 (Swedish Rules, Article 2 (3)).

<sup>5</sup> *A.J.*, xxxiv. (1940), Suppl., p. 56. A similar Proclamation was made in October 1939.

<sup>6</sup> In March 1940 Norway interned a German submarine which ran aground in Norwegian territorial waters.

<sup>7</sup> See above, vol. i. § 450.

<sup>8</sup> For this reason there was no justification for the original British contention in the case of the German auxiliary vessel, the *Altmark* (see above, § 325A), that as the latter was a man-of-war carrying British prisoners, she ought to have been searched by the Norwegian authorities with the view to releasing the prisoners. On the other hand, in so far as a search might have disclosed the pres-

the other hand, belligerent men-of-war are expected to comply with all orders made by the neutral to prevent them from making his ports the base of their operations of war—an order, for instance, not to leave the ports at the same time as vessels of the other belligerent. And, if they do not comply voluntarily, they may be made to do so through application of force, for a neutral has a duty to prevent by all means at hand the abuse of the asylum granted.

Special provision is made by Article 24 of Convention XIII. for the case of a belligerent man-of-war which refuses to leave a neutral port :

‘ If, notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port in which it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of putting to sea so long as the war lasts, and the commanding officer of the ship must facilitate the execution of such measures. When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained. The officers and crew so detained may be left in the ship or kept either on another vessel or on land, and may be subjected to such measures of restriction as it may appear necessary to impose upon them. A sufficient number of men must, however, be always left on board for looking after the vessel. The officers may be left at liberty on giving their word not to quit neutral territory without permission.’<sup>1</sup>

ence, denied by the captain of the *Altmark*, of British prisoners, it would have been a relevant factor in assisting the Norwegian Government in deciding to what extent the passage was an innocent one in the sense indicated above (§ 325A). While the Norwegian Government was not entitled to insist on searching the *Altmark*, the refusal of her captain to submit to search could properly have been construed as an indication of the character of her voyage. The question does not seem to have been raised whether an auxiliary vessel, not fully converted into a man-of-war in accordance with the provisions of Hague Convention No. VII. (see above, § 84), is entitled to the full immunities enjoyed by a man-of-war. In so far as the *Altmark* enjoyed no such privileges or in so far, as contended by Germany, she was a peaceful merchant-vessel, the prisoners

on board her were probably entitled to release by analogy with the case of prisoners of war brought by the retreating belligerent into neutral jurisdiction (see above, § 337). Similarly, prisoners of war on board a prize which is lawfully brought into a neutral port do not become free so long as they are not brought on shore: see *The Sitka* (1855), Opinions of United States Attorneys-General, vii. 122; Pitt Cobbett, *Leading Cases*, i. 269. Contrast the case of the *Appam*, above, § 328a, whose British crew and passengers were set free by the American Government.

<sup>1</sup> If an officer, left at liberty on giving his word, nevertheless escapes from the neutral country, his Government is in duty bound to compel him to return, and the neutral Government can subject him to disciplinary punishment for having



If a vessel is interned, and therefore dismantled, she loses the character of a man-of-war. She no longer enjoys the privilege<sup>1</sup> of extritoriality due to men-of-war in foreign waters, and prisoners on board become free, although they must be detained by the neutral concerned.<sup>2</sup>

Facilities  
to Men-  
of-War  
during  
Asylum.

§ 346. A belligerent man-of-war, to which temporary asylum is granted in a neutral port, is not only not disarmed and detained; as has already been stated, facilities may even be rendered to her as regards slight repairs,<sup>3</sup> the supply in limited quantities of provisions and coal,<sup>4</sup> and, under certain circumstances, the enrolment of a very small number of sailors.<sup>5</sup>

Abuse of  
Asylum to  
be pro-  
hibited.

§ 347. However, it would be easy for belligerent men-of-war receiving temporary asylum in neutral ports to abuse it, if neutrals were not required to prohibit such abuse.

(1) A belligerent man-of-war can abuse asylum, in the first place, by ascertaining whether any, and if so what kind of, enemy vessels are in the same neutral port, accompanying them when they leave, and attacking them immediately they reach the open sea. To prevent such abuse, in the eighteenth century several neutral States arranged that, if belligerent men-of-war or privateers met enemy vessels in a neutral port, they were not to be allowed to leave together, but an interval of at least twenty-four hours was to elapse between the sailing of the vessels. During the nineteenth century this so-called twenty-four hours rule was enforced by the majority of States, and the Second Hague Conference, as has already been mentioned,<sup>6</sup> expressly enacted it.

(2) Asylum can, secondly, be abused by wintering in a port in order to wait for other vessels of the same fleet, or by similar intentional delay. There is no doubt that neutrals

broken his parole. See the remarkable case of the escape of members of the crews of German cruisers interned on parole in the United States, reported by Scott in *A.J.*, x. (1916) pp. 877-882, and Garner, ii. § 563. See also Ariga, *La Chine et la grande guerre européenne* (1920), pp. 111-115.

<sup>1</sup> See Scott in *A.J.*, x. (1916) pp. 355-357.

<sup>2</sup> See below, § 348a (6).

<sup>3</sup> See above, § 333 (5).

<sup>4</sup> See above, § 333 (4).

<sup>5</sup> See above, § 333 (3).

<sup>6</sup> See above, § 333 (2).

must prohibit this abuse by ordering such belligerent men-of-war to leave the neutral ports.<sup>1</sup>

(3) Asylum can, thirdly, be abused by the extent and character of the repairs undergone by a belligerent man-of-war which has become unseaworthy.

(4) Asylum can, lastly, be abused by remaining in a neutral port an undue length of time in order to escape attack and capture by the other belligerent.<sup>2</sup> Since nowadays a right of pursuit into neutral waters, which was asserted by Bynkershoek,<sup>3</sup> is no longer recognised, it would be an abuse of asylum if an escaping vessel were allowed to make a prolonged stay in the neutral waters, and a neutral who allowed it would violate his duty of impartiality by assisting one of the belligerents to the disadvantage of the other.<sup>4</sup>

§ 348. It may happen during war that neutral men-of-war pick up, and save from drowning, soldiers and sailors belonging to belligerent men-of-war sunk by the enemy, or that they take them on board for other reasons. Neutral

Neutral  
Men-of-  
War as an  
Asylum.

<sup>1</sup> See above, § 333 (6).

<sup>2</sup> See above, § 333 (8).

<sup>3</sup> *Quaestiones Juris publici*, i. c. 8.  
See also above, §§ 288, 320.

<sup>4</sup> Therefore, when, after the battle off Port Arthur in August 1904, the Russian battleship *Czarevitch*, the cruiser *Novik*, and three destroyers escaped and took refuge in the then German port of Tsing-Tau, the *Novik*, which was uninjured, had to leave the port after a few hours, whereas the other vessels, which were too damaged to leave the port, were disarmed and, together with their crews, detained till the conclusion of peace. Again, when, at the end of May 1905, after the battle of Tsushima, three damaged Russian men-of-war, the *Aurora*, *Oleg*, and *Zemshug*, escaped into the harbour of Manila, the United States of America ordered them to be disarmed and, together with their crews, to be detained during the war.

It was only during the Russo-Japanese War in 1904 that this

became generally recognised; but Article 24 of Convention XIII. places it beyond all doubt. Until that war, it was controverted whether a neutral was obliged either to dismiss or to disarm and detain men-of-war which had fled into his ports to escape attack and capture. See Hall, § 231, and Perels, § 39, p. 213, in contradistinction to Fiore, iii. No. 1579. The 'Règlement sur le Régime légal des Navires et de leurs Equipages dans les Ports étrangers,' adopted by the Institute of International Law in 1898 at its meeting at The Hague—see *Annuaire*, xvii. (1898) p. 273—answered (Article 42) the question in the affirmative.

This case marks the difference between the duties of neutrals as regards asylum to land forces and asylum to naval forces. Whereas land forces crossing neutral frontiers must either be at once repulsed or else detained, men-of-war may be granted the right to stay for some limited time within neutral harbours and then leave unhindered; see above, § 342.

men-of-war being an asylum for the members of the belligerent armed forces so rescued, the question arose whether they must be given up to the enemy, or must be detained during the war, or may be brought to their home country.<sup>1</sup>

Article 13 of Convention X. of the Second Hague Conference settled the question raised by these cases as follows: 'If wounded, sick, or shipwrecked are taken on board a neutral man-of-war, precaution must be taken, so far as possible, that they do not again take part in the operations of the war.'<sup>2</sup>

Neutral  
Territory  
and Ship-  
wrecked  
Soldiers  
and  
Sailors.

§ 348a. Just as in war on land members of the belligerent forces may find themselves on neutral territory, so in war on sea shipwrecked or wounded or sick belligerent soldiers and sailors may be brought into neutral territory, or reach it by their own efforts. The more important cases that may occur are the following:

(1) A belligerent man-of-war may capture shipwrecked, wounded, or sick enemy soldiers or sailors, and, instead of sending them to one of her own ports, send them to a neutral

<sup>1</sup> For some cases during the Chino-Japanese War in 1894 and the Russo-Japanese War in 1904 see Takahashi, *Cases on International Law during the Chino-Japanese War* (1899), pp. 36, 51, 462-466, and Lawrence, *War*, pp. 63-75.

<sup>2</sup> Two new classes of cases, however, which occurred during the World War, raised difficulties as to the proper interpretation of this article. (1) It speaks only of neutral *men-of-war*, and says nothing concerning the case in which other neutral *public vessels*—such as lightships, revenue cutters, and the like—rescue wounded, sick, or shipwrecked soldiers or sailors. There ought to be no doubt that this article must be applied to such vessels by analogy, although during the World War it was reported that Holland did not detain, but released, a number of German airmen who had been rescued by a Dutch public lightship (see Spaight, *Air*, p. 436).

(2) In the case of the *Runhild*, the

question arose whether Article 13 applied if a neutral warship rescued wounded, sick, or shipwrecked soldiers or sailors, not on the open sea, but within the maritime belt of the neutral concerned. The *Runhild* was a Swedish vessel, captured in November 1916 by a German submarine. While being navigated by a prize crew towards a German port, she struck a mine and sank. All on board entered the lifeboats and rowed towards the Swedish coast; after having reached the Swedish maritime belt, they were taken on board by a Swedish torpedo-boat and subsequently landed in Sweden. The prize crew were at first interned by Sweden according to Article 13; but, on protest from Germany, they were released in July 1917, the Swedish Government asserting—incorrectly, I believe—that this article only applies when the rescue is effected on the open sea (see Feilchenfeld in *Strupp, Wört.*, ii. p. 410).

port. The neutral concerned *need not* receive them ; but he *may* grant them asylum. If he does, according to Article 15 of Convention X. he is obliged—unless there is an arrangement to the contrary between him and both belligerents—to guard them so as to prevent them from again taking part in the war<sup>1</sup> ; and the expenses of tending and interning them have to be paid by the belligerent to whom they belong.

(2) Neutral merchantmen<sup>2</sup> may have rescued wounded, sick, or shipwrecked soldiers or sailors of their own accord, or may have taken them on board by request from a belligerent man-of-war. According to Article 12<sup>3</sup> of Convention X., the surrender of these men may at any time be demanded by any belligerent man-of-war. But if such a demand be not made, and the men are brought into a neutral port, it is an indirect inference from Article 13 (which stipulates the detention of men received by neutral *men-of-war*) that men brought in by a neutral *merchantman* need not be detained.

(3) Shipwrecked soldiers or sailors may, by their own efforts, succeed in reaching a neutral coast, be it by swimming, or by clinging to rafts, or in one of their own lifeboats. Neither Convention X. nor Convention XIII. provides for this case. However, the fact that shipwrecked soldiers and sailors rescued by a neutral merchantman and landed in a neutral harbour need not be detained, warrants the opinion that they need not be detained in case they succeed in reaching a neutral coast by their own efforts. For why

<sup>1</sup> See above, § 205. The Italian Neutrality Regulations of 1938 lay down that members of belligerent forces who have been rescued by an Italian man-of-war outside territorial waters must be interned (Article 27).

<sup>2</sup> See above, § 208 (2). From the case of *shipwrecked* sailors there must be distinguished that of the officers and crew of a warship voluntarily sunk. Thus when the officers and crew of the German battleship the *Graf Spee*, who scuttled herself outside the port of Montevideo in December 1939, reached Argentina a day later

in Argentine vessels, they were all interned. The Argentine Government, in rejecting the German protest against the internment, declined to admit that there was an analogy between that case and the case, invoked by Germany, of the British cruisers *Cressy*, *Aboukir*, and *Hogue* (see below, p. 598), which were sunk off the Dutch coast in 1914 and whose shipwrecked crews were released by Holland.

<sup>3</sup> Which is interpreted by Great Britain in a restricted sense ; see Higgins, p. 536.

should they be treated worse than those rescued and landed by neutral merchantmen ? <sup>1</sup>

(4) It may happen that belligerent vessels are unlawfully attacked and sunk by the other belligerent while in neutral territorial waters, and soldiers or sailors from these vessels may reach the neutral shore. Conventions X. and XIII. do not provide for this case either. Since, even if the vessel had been lawfully attacked and sunk on the open sea, these men need not be detained if they are brought to a neutral port by a neutral merchantman, or reach it by their own efforts, they surely need not be detained if their vessel was unlawfully attacked and sunk in neutral waters. Indeed, in this case, even if they are rescued by a neutral man-of-war and landed on the neutral shore, they need not be detained. The reason for this is, that the attacked vessel, and the men on board, being legitimately in neutral territory when the vessel was unlawfully sunk, the survivors were not saved from *lawful* capture by the rescuing man-of-war. Their capture by the enemy would have been as unlawful as was the sinking of their vessel; and Article 13 <sup>2</sup> of Convention X. therefore does not apply.<sup>3</sup>

(5) Armed guards placed by a belligerent on a neutral merchantman may reach a neutral port. During the World War the Allies quite generally resorted to the practice of sending neutral merchantmen stopped by their cruisers to a belligerent port for the purpose of search.<sup>4</sup> These vessels

<sup>1</sup> The practice during the World War was not uniform. Thus Norway detained survivors from the sunk British vessels *India* and *Lord Alverstone* who succeeded in reaching the Norwegian coast; and Spain detained the surviving combatants from the British transport *Woodfield* who reached the Moroccan coast in their own lifeboat. On the other hand, Spain did not detain the German prize crew who gained the Spanish coast in a lifeboat belonging to their prize the *Thyra*; and Greece, while still neutral, did not detain the survivors of the *Ramazan*, a sunk British troopship.

<sup>2</sup> See above, § 348.

<sup>3</sup> During the World War, Denmark

ruled differently. In August 1915 a British submarine ran aground in Danish territorial waters, and was notified that she must be refloated within twenty-four hours to avoid sequestration. However, before the lapse of this period she was attacked and sunk by a German destroyer. Survivors were rescued by a Danish man-of-war and landed in Denmark; and the Danish Government held that they must be detained. The case of the *Dresden* (see below, § 361), in which the survivors were detained by Chile, is different, because orders had been given for her to be disarmed, and her men interned, before the attack by the British occurred.

<sup>4</sup> See below, § 421a.

were not captured, but were simply ordered to navigate to a certain belligerent port ; and frequently an armed guard was placed on board so as to ensure obedience. Now, if one of these vessels on her way to the belligerent port of search was compelled by distress to call at a neutral port, there would certainly be no duty upon the neutral to detain the crew, because the case is analogous to that of a prize in distress brought into a neutral port.<sup>1</sup>

(6) Prisoners of war held on a belligerent vessel may reach neutral shores. Two classes of cases must here be distinguished :

(i) It may happen that the vessel is attacked by the enemy and sunk or wrecked, and that surviving prisoners either reach a neutral coast by their own efforts or are rescued and brought there by a neutral merchantman. Or again, prisoners on a belligerent vessel may jump overboard while the vessel is at sea and reach a neutral coast. The case of these men is analogous to that of prisoners on land who escape into neighbouring neutral territory. For this reason the neutral must not detain them, but must allow them to leave the country ; only if the neutral permits them to remain in the country may he intern them.<sup>2</sup>

(ii) On the other hand, it may happen that prisoners of war are held on board a belligerent vessel which is in a neutral port for legitimate purposes, but, having failed to leave it in due time, is detained with its officers and crew. What is the fate of the prisoners on board ? That they now become free, there is no doubt ; but as both parties arrived legitimately in the neutral harbour, if the neutral afterwards detains the officers and crew he must in justice likewise detain the former prisoners of war.<sup>3</sup>

§ 348b. During war shipwrecked war material—or even an abandoned shipwrecked man-of-war—belonging to a belligerent may be brought to neutral territory. Several cases must be distinguished :

Neutral  
Territory  
and Ship-  
wrecked  
War  
Material.

(1) In case such shipwrecked war material is brought into

<sup>1</sup> See above, § 328, and Article 21 of Convention XIII.

<sup>2</sup> See above, § 337, and Article 13 of Convention V.

<sup>3</sup> See above, § 345.

neutral territory by the forces of the belligerent owner for the purpose of avoiding capture by the enemy, there is no doubt that the neutral State must sequester it, and must not restore it to the belligerent owner till after the war.

(2) The same is valid in case shipwrecked war material is washed up on a neutral shore, or is salvaged at sea by a neutral man-of-war.

(3) Different, however, is the case, which is not settled, of shipwrecked war material being picked up on the open sea by neutral *merchantmen* and carried to a neutral harbour. Several such cases occurred during the World War, in which shipwrecked combatants and war material were brought into Dutch ports.<sup>1</sup> In all these cases the rescued combatants were released, but the shipwrecked material was retained by Holland. The British Government demanded the release of the material also, correctly contending that there was no rule of International Law which forced a neutral Government to retain it, and that the case of shipwrecked material brought by neutral merchantmen into a neutral port was essentially similar to that of rescued belligerent soldiers and sailors similarly brought into a neutral port. The Dutch Government, however, for reasons which it is difficult to accept, refused to agree, asserting that the duties of neutrality did not allow them to release the war material, although a special rule allowed them to release the officers.<sup>2</sup>

<sup>1</sup> In December 1914 the *Orn*, a Norwegian merchant-vessel, salvaged part of the naval gear of the British cruisers *Cressy*, *Hogue*, and *Aboukir*, which had been sunk by submarine, and brought it to the Hook of Holland. In the same month the same vessel brought to the Hook of Holland a British officer and a mechanic in a seaplane which had been forced to descend in the North Sea. In April 1916 ship's gear and a quantity of stores of various kinds belonging to the British destroyer *Medusa*, which had been abandoned by her crew in the North Sea, were salvaged by Dutch fishermen, and

brought to Holland. In the same month Lieutenant Beare's seaplane was obliged to descend in the North Sea, and he was rescued together with his machine by a Dutch fishing-boat, which took them to a Dutch port. In September 1917 a British seaplane manned by Lieutenant Hopcroft and Petty-Officer Garner, which had been forced to descend in the North Sea, was rescued by a Dutch fishing-boat and taken to a Dutch port (see Parl. Papers, Misc. No. 4 (1918), Cmd. 8985).

<sup>2</sup> See above, § 348a(2). See Spaight, *Air*, pp. 435-439, for comment on many of these incidents.

## VI

### SUPPLIES AND LOANS TO BELLIGERENTS

Vattel, iii. § 110—Hall, §§ 216-217—Westlake, ii. pp. 251-253—Lawrence, § 235—Phillimore, iii. § 151—Twiss, §§ 227, 228—Halleck, ii. pp. 185-186—Taylor, §§ 622-625—Walker, § 67—Wharton, iii. §§ 390-391—Moore, vii. §§ 1307-1312—Bluntschli, §§ 765-768—Heffter, § 148—Geffcken in *Holtendorff*, iv. pp. 686-700—Ullmann, §§ 191-192—Fauchille, §§ 1469-1475—Despagnet, Nos. 693-694—Rivier, ii. pp. 385-411—Calvo, iv. §§ 2624-2630—Fiore, iii. Nos. 1559-1563—Martens, ii. § 134—Kleen, i. §§ 66-69, 96-97—Mérignhac, iii<sup>a</sup>. pp. 547-575—Pillet, pp. 289-293—Dupuis, Nos. 317-319—Hyde, ii. §§ 867-869—Rolin, §§ 1001-1003, 1125-1129—Cruchaga, §§ 1196-1206—*Land Warfare*, §§ 477-480—Einicke, *Rechte und Pflichten der neutralen Mächte im Seekrieg* (1912), pp. 71-117—Pyke, *The Law of Contraband of War* (1915), pp. 55-88—Gregory, *The Manufacture and Sale of Munitions of War* (1916)—Westlake, *Papers*, pp. 362-392—Nys in *R.I.*, 2nd ser., xv. (1913) pp. 181-196—Butte in *A.S. Proceedings*, ix. (1916) pp. 112-134—Morey and Gregory in *A.J.*, x. (1916) pp. 467-491, 543-555—Garner, ii. §§ 546-559, and in *A.S. Proceedings*, 1916, pp. 18-32, and in *A.J.*, x. (1916) pp. 749-797—Dickinson in *A.S. Proceedings*, 1935, pp. 45-51—Preuss, *ibid.*, 1937, pp. 108-119.

§ 349. The duty of impartiality must prevent a neutral State from supplying belligerents with arms, ammunition, vessels, and military provisions,<sup>1</sup> whether for money or gratuitously.

Supply on the part of Neutral States.

A neutral State which sold arms and ammunition to a belligerent at a profit, or supplied them as a gift, would violate the duty of impartiality. So far as direct transactions regarding such supply between belligerents and neutral States are concerned, the rule is settled. The case is different, however, where a neutral State does not directly and knowingly deal with a belligerent, but is, or ought to be, aware that it is indirectly supplying a belligerent. Different neutral States have taken up different attitudes regarding cases of this kind.<sup>2</sup> Article 6 of Convention XIII. prohibits the supply in any manner, directly or indirectly,

<sup>1</sup> See Article 6 of Convention XIII. pp. 229-254. For some examples see

<sup>2</sup> See Martens, *Causées célèbres*, v. previous edition, § 349.



by a neutral State to a belligerent, of warships,<sup>1</sup> ammunition, or war material of any kind whatever.<sup>2</sup>

Supply on  
the part of  
Subjects  
of  
Neutrals.

§ 350. In contradistinction to supply to belligerents by neutral States, the supply of such articles by subjects of neutrals is lawful, and neutral States are not, therefore, obliged by their duty of impartiality to prevent it. Article 7 of Convention V. and Article 7 of Convention XIII. concur in enacting the old customary rule that 'a neutral Power is not bound to prevent the export or transit, for one or other of the belligerents, of arms, munitions of war, or, in general, of any thing which can be of use to an army or fleet.' Moreover, Article 18<sup>3</sup> of Convention V. recognises that the furnishing of supplies to one belligerent by subjects of neutral States who do not live on the territory of the other belligerent, or on territory occupied by him, does not invest them with enemy character. When, in August 1870, during the Franco-German War, Germany lodged complaints with the British Government for not prohibiting its subjects from supplying arms and ammunition to the French Government, Great Britain correctly replied that she was not by International Law under any obligation to prevent her subjects from doing so.

Again, during the World War, the Government of the United States took up the same attitude when Germany and Austria-Hungary complained because American manufacturers and traders supplied the Allies with arms and ammunition.<sup>4</sup>

Of course, a neutral State which is anxious to avoid all

<sup>1</sup> See also Fauchille, § 1471, who asserts further that a neutral State must not *buy* a belligerent warship and so prejudice the other belligerent by putting it out of his power to capture her, citing the case of the *Goeben* and the *Breslau* in August 1914, and editorial comment in *A.J.*, ix. (1915) pp. 195-198. See also Rolin, § 1127, and note in Hall, § 217.

<sup>2</sup> It is not clear to what extent the latter expression covers the supply 'in general, of anything which can be of use to an enemy or fleet' (Article 7) and the sale of which by private individuals the neutral State

is not bound to prevent. In modern mechanised warfare the importance of articles like oil, or certain metals for direct military use is such as to render of doubtful legality their supply by the neutral State.

<sup>3</sup> That Great Britain entered a reservation against Article 18 was pointed out above, in § 88 (n.), where the meaning of the reservation was explained.

<sup>4</sup> See *A.J.*, ix. (1915) pp. 687-694, 927-934, and the excellent article of Garner in *A.J.*, x. (1916) pp. 749-797; see also Garner, ii. §§ 546-558.

controversy and friction can, by his Municipal Law, order his subjects to abstain from furnishing such supplies, as, for instance, did Switzerland and Belgium during the Franco-German War.<sup>1</sup> But such an attitude is dictated by political prudence, and not by any obligation imposed by International Law; and it would constitute a violation of neutrality to prohibit the export of supplies to one belligerent only.<sup>2</sup>

The endeavour to make a distinction between furnishing supplies in single cases, or on a small scale, and furnishing supplies on a large scale, and to regard only the former as lawful,<sup>3</sup> has found recognition neither in theory nor in practice. As International Law stands, belligerents may make use of visit, search, and seizure to protect themselves against the conveyance of contraband to the enemy by sea by subjects of neutrals. But so far as their home State is concerned, such neutral subjects, at the risk of having their property seized during transit, may supply either belligerent with any amount of arms, ammunition, coal, provisions and even with armed ships,<sup>4</sup> provided always that they deal with the belligerents in the ordinary way of commerce.

The case is different when neutral subjects are not engaged in ordinary commerce with a belligerent Government, but are directly supplying a belligerent army or navy or parts of them. If, for instance, a belligerent fleet is cruising outside the maritime belt of a neutral, that neutral must prevent vessels belonging to his subjects from bringing coal, arms, ammunition, and provisions to that fleet; for otherwise he would be allowing the belligerent to use neutral resources for naval operations.<sup>5</sup> But he need not prevent vessels belonging to his subjects from bringing coal, arms, ammunition, and provisions to belligerent ports, although the supply is destined for the navy and the army of the

<sup>1</sup> For other numerous examples see *Harvard Research* (1939), pp. 281-306.

<sup>2</sup> See above, § 316.

<sup>3</sup> See Bluntschli, § 766; Liszt, § 66 (v.); and Pohl, *Amerikas Waffen- ausfuhr und Neutralität* (1917).

<sup>4</sup> See above, § 334, and below, § 397.

<sup>5</sup> See above, § 333 (4); and the Note addressed by Austria-Hungary to the United States on June 29, 1915, during the World War, and the American reply of August 12, 1915, cited by Garner, ii. § 549 (n.).

belligerent. Nor need he prevent belligerent merchantmen from coming into his ports and transporting arms and the like, bought from his subjects, to the ports of their home State. Nor need he prevent vessels belonging to his subjects from following a belligerent fleet, and supplying it *en route*<sup>1</sup> with coal, ammunition, provisions, and the like, provided that this does not take place in the neutral maritime belt.

There is no doubt, then, that, subject to the legal obligations of the Covenant of the League and the moral obligations resulting from the General Treaty for the Renunciation of War,<sup>2</sup> neutral States need not prevent their subjects from supplying belligerents with arms and ammunition. Occasionally proposals have been put forward in the direction of imposing upon neutrals the duty to prevent their subjects from supplying arms and munitions to belligerents on the ethical ground that such supply tends to encourage and prolong wars. However, it is clear that an alteration of the present law would in many cases affect injuriously the innocent belligerent, who had not expected an attack, and was therefore not prepared for war, while his adversary, who planned the attack, would have made ample preparation.<sup>3</sup> To maintain, therefore, that the supply of munitions tends to prolong wars and ought accordingly to diminish in proportion as the level of public morality rises, is to simplify a difficult problem. A short war giving the decisive advantage to a lightning attack of an aggressor State may not be productive of results which commend themselves to the moral sense of the nations of the world. On the other hand, there may be cases in which a neutral is bound to prohibit the export of arms and munitions. Thus the prohibition of supply of arms and ammunition to one or both belligerents who, being members of the League,

<sup>1</sup> See above, § 311 (n.).

<sup>2</sup> See above, §§ 52*n*, 292*h*-292*i*.

<sup>3</sup> See above, vol. i. § 51 (7); see also Westlake, *Papers*, pp. 362-392, and Gregory, *The Manufacture and Sale of Munitions of War* (1916), where the present rule of law is very ably defended. For the contrary view see Butte in *A.S. Proceedings*, v. (1916) pp. 112-134. See

also Hyde in *Proceedings of the American Academy of Political Science*, xvi. (1935) pp. 3-11, for some possible changes in the existing law. In this connection Article 8 of the Covenant of the League of Nations, which condemns the manufacture of munitions by private enterprise, is relevant; see above, § 25*h*, 'Reduction and Limitation of Armaments.'

have resorted to war contrary to the provisions of the Covenant, constitutes the very minimum of the obligations laid down in Article 16 of the Covenant. Such discrimination, having been assented to in advance by the belligerent injuriously affected,<sup>1</sup> cannot be regarded as inconsistent with the duties of the neutral State in question. In the war between Bolivia and Paraguay many members of the League, after having originally prohibited the export of arms and ammunition to both belligerents, at the end of 1934 confined that prohibition to Paraguay on the ground that she continued to resort to war contrary to her obligations under the Covenant.<sup>2</sup> The prohibition of export of arms and munitions to Italy during the Italo-Abyssinian War in 1935 and 1936 was one of the sanctions applied against Italy.<sup>3</sup> No such sanction is envisaged in the General Treaty for the Renunciation of War, and, in the absence of supplementary agreements, it is difficult to see how the neutral State may prohibit the export of such supplies to one belligerent only unless this is done as a measure of reprisals taken as retaliation for the disregard of the principal obligation under the Treaty.<sup>4</sup>

§ 351. Subject to what has been said in the previous

<sup>1</sup> See § 306a.

<sup>2</sup> See above, § 25d. See also Mattison, *The Chaco Arms Embargo* (1934), and Toynbee, *Survey*, 1933, pp. 431-433. It would appear that as between members of the League an embargo operative against both belligerents is consistent with the spirit of the Covenant only when both belligerents have resorted to war in violation of the Covenant, or when the legality or otherwise of the resort to war is still undetermined (as was the case in the first stage of the war between Bolivia and Paraguay in 1933), or when the embargo although nominally directed against both belligerents is, owing to the special circumstances of the case (e.g. when the aggressor has command of the sea), in fact operative against the guilty party only. As to the decision of the British Government, in February 1933, not to authorise the issue of licences for the export of arms and ammunition either to China or Japan

after the adoption of the Final Report by the Assembly and its rejection by Japan, see Toynbee, *Survey*, 1933, pp. 511-513. There was at that time technically no war between China and Japan.

<sup>3</sup> See above, § 52e (n.).

<sup>4</sup> See above, § 292j. In February 1934 the Senate of the United States approved a resolution empowering the President to declare an arms embargo upon States engaged in war, but added a condition to the effect that such embargo must apply impartially to both belligerents alike: *Documents*, 1933, p. 459. Similar provisions were included in the Neutrality Acts of 1935 and 1937; they were repealed in the Neutrality Act of 1939. See above, p. 502 (n.). See also Chamberlain, *The Embargo Resolutions and Neutrality* (International Conciliation Pamphlet No. 251 (1929)). And see the literature referred to above, § 292h.

Loans and  
Subsidies  
on the  
part of  
Neutral  
States.

paragraph,<sup>1</sup> his duty of impartiality must prevent a neutral State from granting a loan to either belligerent. Vattel's<sup>2</sup> distinction between interest-bearing loans and loans carrying no interest, and his assertion that loans on the part of neutrals are lawful if they bear interest and are made with the pure intention of making money, have not found favour with other writers. There seem to be no recorded instances of an interest-bearing loan having been made by a neutral State during the nineteenth century.

What applies to a loan applies even more strongly to subsidies in money granted to a belligerent by a neutral State. Through the granting of subsidies a neutral State becomes as much the ally of the belligerent as it would by furnishing him with troops.<sup>3</sup>

Loans and  
Subsidies  
on the  
part of  
Subjects  
of Neutral  
States.

§ 352. It was formerly a moot point in the theory of International Law whether a neutral is obliged by his duty of impartiality to prevent his *subjects* from granting subsidies and loans to belligerents to enable them to continue the war. Several writers<sup>4</sup> maintained either that a neutral was obliged to prevent such subsidies and loans altogether, or at least that he must prohibit a public subscription for them on neutral territory. On the other hand, a number of writers asserted that, since money is just as much an article of commerce as goods, a neutral was in no wise obliged to prevent on his territory a public subscription by his subjects to loans for the belligerents. The practice of the States

<sup>1</sup> See, e.g., the Convention on Financial Assistance, § 52*f* above.

<sup>2</sup> iii. § 110.

<sup>3</sup> See above, §§ 305, 306, 321. According to Article 16 of the Habana Convention on Maritime Neutrality (see above, § 68) a neutral State may, without compromising its neutrality, grant credits for facilitating the sale and exportation of its food products and raw materials. See also, to the same effect, the Final Act of October 3, 1939, of the meeting of the Foreign Ministers of the American Republics (see above, p. 504): *International Conciliation*, January 1940, No. 356, p. 23; *A.J.*, xxxiv. (1940), Suppl., p. 13.

<sup>4</sup> See Phillimore, iii. § 151; Bluntschli, § 768; Heffter, § 148; Kleen, i.

§ 68. The case of *De Witt v. Hendricks* (1824) 9 Moo. 586, quoted by Phillimore in support of his assertion that neutrals must prevent their subjects from subscribing to a loan for belligerents, is not decisive, for Lord Chief Justice Best only decided 'that it was contrary to the Law of Nations for persons residing in this country to enter into any agreements to raise money by way of a loan for the purpose of supporting subjects of a foreign State in arms against a Government in alliance with our own.' See also Westlake, ii. p. 251 (cited by Hyde, ii. § 869), who suggests circumstances in which the neutral Government's neutrality would be compromised by a loan from its subjects.

has established beyond doubt that neutrals need not prevent subscriptions on their territory to loans for belligerents. Thus in 1854, during the Crimean War, France protested in vain against a Russian loan being raised in Amsterdam, Berlin, and Hamburg. In 1870, during the Franco-German War, a French loan was raised in London. In 1877, during the Russo-Turkish War, no neutral prevented his subjects from subscribing to the Russian loan. In 1904, during the Russo-Japanese War, Japanese loans were raised in London and Berlin, and Russian loans in Paris and Berlin.

During the World War, President Wilson of the United States of America, by his advice to the American bankers,<sup>1</sup> at first prevented, though he did not prohibit, the raising of loans by any of the belligerents. But an Anglo-French loan was raised in the United States without objection in September 1915, for the purpose of stabilising the rate of exchange by enabling Great Britain and France to pay for their American purchases in American money; and other similar loans were raised there later.<sup>2</sup> On the other hand, the United States Neutrality Act of 1939 fully retained the provisions of the Act of 1937 which prohibited loans and commercial credits to belligerent Governments.<sup>3</sup> It was not asserted that these prohibitions, intended as a safeguard against the United States becoming involved in the war,<sup>4</sup> were in any way dictated by International Law.

Matters differ somewhat in regard to subsidies to belligerents by subjects of neutrals. A neutral is not indeed obliged to prevent individual subjects from granting subsidies to belligerents, just as he is not obliged to prevent them from enlisting with them. But if he were to allow on his territory a public appeal for subscriptions to such subsidies, he would certainly violate his duty of impartiality ;

<sup>1</sup> Garner, ii. § 569 ; Hyde, ii. § 869 ; *Harvard Research* (1939), pp. 313-316.

<sup>2</sup> The Second Hague Conference, by enacting in Article 7 of Convention V. that a neutral 'is not bound to prevent the export . . . of anything which can be of use to an army or fleet,' has indirectly recognised that he need not prevent the

subscription on his territory to loans for belligerents.

<sup>3</sup> See above, p. 502 (n.).

<sup>4</sup> For a refutation of the view that the entry of the United States into the World War was due to the identity of economic interest brought about by the large American credits to the Allies see Seymour, *American Neutrality, 1914-1917* (1935).

for whereas loans are a matter of commerce, subsidies are not. However, public appeals for subscriptions of money for charitable purposes, *e.g.* for the wounded prisoners, and the like, need not be prevented, even if they are only made in favour of one of the belligerents.<sup>1</sup>

## VII

### SERVICES TO BELLIGERENTS

Westlake, ii. pp. 253-254—Despagnet, No. 696 *bis*—Fauchille, §§ 1476-1476 (2)—Ullmann, § 192—Rivier, ii. pp. 388-391—Nys, iii. pp. 671-678—Calvo, iv. §§ 2640-2641—Martens, ii. § 134—Perels, § 43—Kleen, i. §§ 103-108—Hyde, ii. §§ 871, 872—Rolin, §§ 1045-1048, 1131-1137, 1247-1271—Suarez, § 511—Hatschek, pp. 328-330—Lawrence, *War*, pp. 83-92, 218-220—Scholz, *Drahtlose Telegraphie und Neutralität* (1905), *passim*, and *Krieg und Seekabel* (1904), pp. 122-133—*Land Warfare*, §§ 481-484—Wehberg, § 11—Garner, ii. § 560—Kebedgy in *R.I.*, 2nd ser., vi. (1904) pp. 445-451—Phillipson, *Studies in International Law* (1908), pp. 52-117—*Harvard Research* (1939), pp. 263-281.

**Pilotage.** § 353. Since most maritime States either employ or license pilots, the question whether neutral States may permit them to render services to belligerent men-of-war and transport vessels is of importance. Article 11<sup>2</sup> of Hague Convention XIII. enacts that 'a neutral Power may allow belligerent warships to employ its licensed pilots.' Since, therefore, everything is left to the discretion of neutrals, they will have to take the merits and needs of every case into account. There would certainly be no objection to a neutral allowing belligerent vessels to which asylum is legitimately granted to be piloted into his ports,

<sup>1</sup> The United States Neutrality Act of 1939 made it unlawful to solicit or receive contributions for or on behalf of a belligerent Government. It was expressly laid down that the collection of funds or contributions to be used for such purposes as medical aid or food or clothing was not unlawful unless made for or on behalf of a belligerent Government: *A.J.*, xxxiv. (1940), Suppl., p. 67.

<sup>2</sup> Germany entered a reservation against Article 11. It is not clear whether *ses pilotes brevetés* of Article

11 denotes only pilots actually employed by the State, or includes pilots working for themselves or for some other employer and licensed by the State or some duly constituted authority, such as Trinity House in Great Britain. Probably all pilots must be included, for it is difficult to see how services rendered by pilots not employed by the State could compromise the Government: see Fauchille, § 1463 (1), Rolin, § 1268, Higgins, p. 469 (citing M. Renault's Report), Wehberg, p. 420, and Gemma, p. 372.

and also belligerent war-vessels to be piloted through his maritime belt, if their passage is not prohibited. But a belligerent might justly object to the men-of-war of his adversary being piloted on the open sea by pilots of a neutral Power, except in a case of distress.<sup>1</sup>

§ 354. It is generally recognised that the duty of impartiality incumbent upon a neutral obliges him to prevent his men-of-war and other public vessels from rendering transport services to either belligerent. Therefore, such vessels must neither carry soldiers nor sailors belonging to belligerent forces, nor their prisoners of war, nor ammunition, nor military or naval provisions, nor despatches. The question how far such vessels are prevented from carrying enemy subjects other than members of the forces depends upon the question whether, by carrying those individuals, they render services to one of the belligerents which are detrimental to the other. Thus, when in 1901, during the South African War, the Dutch Government intended to send a man-of-war, the *Gelderland*, to President Kruger to convey him to Europe, they made sure in advance that Great Britain did not object. Article 19 of Convention V. enacts that railway material coming from the territory of neutrals shall not be requisitioned or used by a belligerent, except in the case of, and to the extent required by, absolute necessity.<sup>2</sup>

§ 355. Just as a neutral is not obliged to prevent his merchantmen from carrying contraband, so he is not obliged to prevent them from rendering services to belligerents by carrying, in the way of trade, enemy troops, and the like, and enemy despatches. Neutral merchantmen rendering such services to belligerents do so at their own risk; for these are unneutral services, for which the mer-

Transport  
on the  
part of  
Neutrals.

Transport  
on the  
part of  
Neutral  
Mer-  
chantmen  
and by  
Private  
Neutral  
Rolling  
Stock.

<sup>1</sup> That is, it is suggested, in the case of pilots actually in the employ of the neutral State. See, however, as to pilotage on the open sea, Wehberg, p. 420. Great Britain, during the Franco-German War in 1870, prohibited her pilots from conducting German and French men-of-war which were outside the maritime belt, except when in distress. Den-

mark, Norway, and Sweden, which compel belligerent warships to use local pilots when entering or leaving a harbour, and the like, prohibit their pilots from conducting belligerent warships outside these areas, except when in distress.

<sup>2</sup> See below, § 365, and Rolin, §§ 1045-1048. And see Nowacki, *Die Eisenbahnen im Kriege* (1906), p. 126.



chantmen may be punished<sup>1</sup> by the belligerents, although the neutral State under whose flag they sail bears no responsibility for them whatever.

The same applies to rolling stock belonging to private railway companies of a neutral State. That such rolling stock may not be used by a belligerent without the consent of the companies owning it, for the transport of troops, war material, and the like, except in the case of, and to the extent required by, absolute necessity, follows from Article 19 of Convention V. If, however, a private railway company does give its consent, and if its rolling stock is used for warlike purposes, it acquires enemy character; in that case Article 19 of Convention V. does not apply, and the other belligerent may seize and appropriate it as though it were the property of the enemy State.<sup>2</sup>

Information  
regarding  
Military  
and Naval  
Operations.

§ 356. Information regarding military and naval operations may be given and obtained in so many various ways that several cases must be distinguished:

(1) It is obvious that the duty of impartiality incumbent upon a neutral obliges him to prevent his men-of-war from giving any information to one belligerent concerning the naval operations of the other belligerent. But a neutral bears no responsibility whatever for private vessels sailing under his flag which give such information. Such vessels run the risk, however, of being punished for rendering unneutral service.<sup>3</sup>

(2) It is likewise obvious that his duty of impartiality must prevent a neutral from giving information to a belligerent concerning the war through his diplomatic envoys, couriers, and the like.<sup>4</sup> But the question has been raised

<sup>1</sup> See below, §§ 407-413a.

<sup>2</sup> See Nowacki, *Die Eisenbahnen im Kriege* (1906), p. 128. The Russian action in 1940 in allowing Germany to take over or to help to run the State railway line cutting through Soviet Galicia from the part of Poland occupied by Germany to the Roumanian frontier was clearly incompatible with neutrality.

<sup>3</sup> See below, §§ 409, 410, and Articles 45 and 46 of the unratified Declaration of London. In 1939

several neutral States adopted legislation prohibiting the transmission of information concerning the position, movement, or cargo of national and foreign shipping. See, e.g., the Danish Decree of September 9, 1939.

<sup>4</sup> During the World War, the Swedish minister to Argentina, Baron Lowen, transmitted cipher messages on behalf of the German envoy, Count Luxburg, thereby violating Swedish neutrality (see *A.J.*, xii. (1918) pp. 135-140).

whether a neutral is obliged to prevent couriers<sup>1</sup> from carrying despatches for a belligerent over his neutral territory. The answer must be in the negative, at least so far as those couriers are concerned who are in the service of diplomatic envoys, and those agents who carry despatches from a State to its head or to diplomatic envoys abroad. Since they enjoy<sup>2</sup> inviolability for their persons and official papers, a neutral cannot interfere so as to find out whether they are carrying information to the disadvantage of the enemy.

(3) According to Article 8 of Convention V., 'a neutral Power is not bound to forbid or restrict the employment, on behalf of belligerents, of telegraph or telephone cables, or of wireless telegraphy apparatus, whether belonging to it, or to companies, or to private individuals.' Since, therefore, everything is left to the discretion of the neutral State concerned, it will have to take the merits and needs of every case into consideration, and act accordingly. But so much is certain, that a belligerent has no right to insist that neutral States should forbid or restrict such employment of their telegraph wires, etc., on the part of his adversary. On the other hand, their duty of impartiality must compel neutral States to prevent the despatch from their territory of wireless messages sent to enable belligerent cruisers outside the neutral territorial waters to watch for and capture, so soon as they depart, vessels which have been within those waters, or any other wireless messages through the sending of which their neutral territory becomes a base of naval or military operations for one of the belligerents.<sup>3</sup>

During the World War, in order to discharge the duties so laid upon them, all the maritime neutral States of importance prevented belligerent merchantmen in their ports from

<sup>1</sup> See Calvo, iv. § 2640.

<sup>2</sup> See above, vol. i. §§ 405, 457.

<sup>3</sup> See Article 4 of the proposed Rules for the Control of Radio in Time of War, Cmd. 2201 of 1924, and in *A.J.*, xvii. (1923), Suppl., pp. 242-245; and see Garner, ii. § 560; Rodgers in *A.J.*, xvii. (1923) pp. 629-640; Coudert in *Annuaire*, xxxiii. (1) (1927) pp. 170-184; Wilson in *Iowa Law Review*, xix. (1933-1934) pp. 295-298; P. de La Pradelle in *R.I.*

(*Paris*), xviii. (1936) pp. 107-120; Colt de Wolf in *A.J.*, xxx. (1936) pp. 117-123; *Harvard Research* (1939), pp. 263-279. The Italian Neutrality Regulations of 1938 forbid radio-telegraphic stations in Italian territory and on Italian ships or aircraft to send to belligerents information concerning armed forces or war operations except when such information is available for the general public news service (Article 11).

using their wireless installation. Thus Sweden, which shortly after the outbreak of the war had passed a law prohibiting vessels in Swedish ports from using their wireless apparatus, in February 1916, in consequence of violations of that law by the German vessel *Mecklenburg*, sealed the wireless apparatus on that and other German vessels in Swedish ports. Again, during the course of the war, the United States of America, while still neutral, took control of the private wireless telegraphy stations which had been erected in the United States before the war, and prevented all stations from transmitting cipher messages.<sup>1</sup> On the outbreak of the war in Europe in September 1939 practically all neutral States issued regulations prohibiting belligerent vessels from employing within neutral territorial waters their radio-telegraphic or radio-telephonic apparatus except in case of distress. Many neutral States ordered foreign merchant-vessels generally to close down their radio-telegraphic stations when entering neutral ports, and some neutral States imposed the same restriction upon vessels flying their own flag.<sup>2</sup> In addition, regulations were issued for supervising the activities of wireless stations on land and of wireless apparatus installed on aircraft as well as of broadcasting stations. A number of neutral States prohibited the acceptance of telegrams or radio-telegrams drawn up in a secret language or calculated to affect the neutrality of the country.

A different situation arises when a belligerent intends to arrange the transmission of messages through a submarine cable laid for that very purpose over neutral territory, or through telegraph and telephone wires erected for that purpose on neutral territory. This would seem to be an abuse of neutral territory, and the neutral must prevent it.<sup>3</sup>

<sup>1</sup> See Garner, ii. § 560.

<sup>2</sup> See, e.g., the Argentine Decrees of September 4, 1939.

<sup>3</sup> Accordingly, when in 1870, during the Franco-German War, France intended to lay a telegraph cable from Dunkirk to the north of France—the cable to go across the Channel to England and from there back to France—Great Britain re-

fused her consent on account of her neutrality. Again, in 1898, during war between Spain and the United States of America, when the latter intended to land at Hong-Kong a cable proposed to be laid from Manila, Great Britain refused her consent. See Fauchille, § 1321 (1); Phillipson, *op. cit.*, p. 92; Lawrence, *War*, p. 219.

The case is likewise different when a belligerent intends to erect in a neutral country, or in a neutral port or neutral waters, a wireless telegraphy station, or any apparatus intended as a means of communication with belligerent forces on land or sea, or to make use of any installation of this kind established by him before the outbreak of war for purely military purposes, and not previously opened for the services of the public generally. According to Articles 3 and 5 of Convention V. and Article 5 of Convention XIII., a neutral is bound to prohibit this. When in 1904, in the Russo-Japanese War, during the siege of Port Arthur, the Russians installed an apparatus for wireless telegraphy in Chifu, and communicated thereby with the besieged, this constituted a violation of neutrality.

(4) It is obvious that his duty of impartiality must prevent a neutral from allowing belligerents to establish intelligence bureaux on his territory.<sup>1</sup> On the other hand, a neutral is not obliged to prevent his subjects from giving information to belligerents, be it by letter, telegram, telephone, or wireless telegraphy. In particular, a neutral is not obliged to prevent his subjects from giving information to belligerents by wireless telegraphy apparatus installed on a neutral merchantman. Such individuals run, however, the risk of being punished as spies, if they act clandestinely or under false pretences,<sup>2</sup> and the vessel is liable to be captured and confiscated for rendering unneutral service.

On the other hand, newspaper correspondents making use of a wireless installation on a neutral merchantman for the purpose of sending news to their papers<sup>3</sup> may not be treated as spies—although during the Russo-Japanese War Russia threatened to treat them as such—and the merchantman may not be confiscated, although belligerents need not allow the presence of such vessels at the seat of war. But, of course, an individual can at the same time be a corre-

<sup>1</sup> See Fauchille, § 1476 (1), on the attitude of the Swiss Government during the World War.

<sup>2</sup> See above, § 159.

<sup>3</sup> See the case of the *Haimun* (Lawrence, *War*, pp. 85-92). On the

position of newspaper correspondents in naval warfare, as it was before the World War, see Higgins, *War and the Private Citizen* (1912), pp. 91-112, and in *Z.V.*, vi. (1912) pp. 19-28, and the literature and cases there cited.

spondent for a neutral newspaper and a spy, and he may then be punished by the belligerents for espionage.

Aerial  
Observa-  
tion from  
Neutral  
Territory

§ 356a. The principle that neutral territory must not become the basis of activities directly connected with the war operations imposes upon the neutral State the duty to use the means at its disposal to prevent within its territory aerial observation made for the purpose of conveying to a belligerent information concerning the movements, operations or defences of the other belligerent. The Hague Air Rules of 1923<sup>1</sup> contain an express provision to that effect, and so do various municipal neutrality regulations.<sup>2</sup>

## VIII

### VIOLATION OF NEUTRALITY

Hall, §§ 227-229—Lawrence, §§ 233, 238, 239—Phillimore, iii. §§ 151a-151b—*Letters by Historicus, Belligerent Violation of Neutral Rights* (1863), pp. 149-162—Taylor, §§ 630, 642—Wharton, iii. §§ 402, 402a—Wheaton, §§ 429-433—Moore, vii. §§ 1319-1328, 1334-1335—Bluntschli, §§ 778-782—Heffter, § 146—Geffcken in *Holtzendorff*, iv. pp. 667-676, 700-709—Ullmann, § 191—Fauchille, §§ 1476 (6)-1476 (9)—Despagne, No. 697—Pradier-Fodéré, viii. No. 3235—Rivier, ii. pp. 394-395—Calvo, iv. §§ 2654-2666—Fiore, iii. Nos. 1567-1570—Martens, ii. § 138—Kleen, i. § 25—Dupuis, Nos. 332-337—Suarez, §§ 513, 518—*Strupp, Wört.*, ii. pp. 126-128, 132—Hyde, ii. §§ 887, 888—Einicke, *Rechte und Pflichten der neutralen Mächte im Seekrieg* (1912), pp. 326-364—Schramm, pp. 79-82—Garner, ii. § 562—Harris in *A.S. Proceedings*, ix. (1915) pp. 31-39—*Harvard Research* (1939), pp. 245-249, 256-263.

Violation  
of  
Neutral-  
ity in the  
Narrower  
and in  
the Wider  
Sense of  
the Term.

§ 357. Many writers who speak of violation of neutrality only treat under this head violations of the duty of impartiality incumbent upon neutrals. Indeed, such violations only are meant, if one speaks of violation of neutrality in the narrower sense of the term. However, it is necessary for obvious reasons to discuss, not only violations of the duty of

<sup>1</sup> Article 47.

<sup>2</sup> The Scandinavian Neutrality Rules of 1938 (see above, p. 183) provide generally that it is prohibited to carry out in neutral territory 'observations from an aircraft or in any other manner, relating to the movements, operations or defence

works of a belligerent with a view to informing the other belligerent' (Article 13). The neutrality regulations of numerous other countries are to the same effect. See, e.g., Article 17 of the Belgian Regulations of September 3, 1939. See also *Harvard Research* (1939), pp. 279-281, and Spaight, *Air*, pp. 448-450.

impartiality of neutrals, but violations of all duties deriving from neutrality, whether they are incumbent upon neutrals or upon belligerents. In the wider sense of the term, violation of neutrality comprises, therefore, every performance or omission of an act contrary to the duty of a neutral towards either belligerent, as well as contrary to the duty of either belligerent towards a neutral. Everywhere in this treatise the term is used in its wider sense.

Violations of neutrality on the part of belligerents must not be confused with violations of the laws of war, by which subjects of neutral States suffer damage. If, for instance, an occupant levies excessive contributions from subjects of neutral States domiciled in enemy country in contravention of Article 49 of the Hague Regulations, this is a violation of the laws of war, for which, according to Article 3 of Convention IV., he must pay compensation ; but it is not a violation of neutrality.

§ 358. Mere violation of neutrality must not be confused with the ending of neutrality,<sup>1</sup> for neither a violation on the part of a neutral <sup>2</sup> nor a mere violation on the part of a belligerent *ipso facto* brings neutrality to an end. If correctly viewed, the condition of neutrality continues to exist between a neutral and a belligerent in spite of a violation of neutrality. A violation of neutrality is nothing more than a breach of a duty deriving from the condition of neutrality. This applies not only to violations of neutrality by negligence, but also to intentional violations. Even in an extreme case, in which the violation of neutrality is so great that the offended party considers war the only adequate measure in answer to it, it is not the violation which brings neutrality to an end, but the determination of the offended party.

Violation  
in contra-  
distinction  
to  
End of  
Neu-  
trality.

But this applies only to mere violations of neutrality, and not to a declaration of war or hostilities. Hostilities are acts of war and bring neutrality to an end <sup>3</sup> ; and a declaration of

<sup>1</sup> See above, § 312.

<sup>2</sup> But this is almost everywhere asserted, as the distinction between the violation of the duty of impartiality incumbent upon neutrals and the ending of neutrality is usually not made.

<sup>3</sup> They have been characterised in contradistinction to mere violations, above, in § 320. See Bassompierre in *R.I.*, 3rd ser., iv. (1923) pp. 236-246.

war brings neutrality to an end even before the outbreak of hostilities.

Consequences of Violations of Neutrality.

§ 359. Violations of neutrality, whether committed by a neutral against a belligerent or by a belligerent against a neutral, are international delinquencies.<sup>1</sup> They may at once be repulsed, and the offended party may require the offender to make reparation, and, if this is refused, may take such measures as he thinks adequate to exact the necessary reparation.<sup>2</sup> If the violation is only slight and unimportant, the offended State will often merely complain. If, on the other hand, the violation is very substantial and grave, the offended State will perhaps at once declare that it considers itself at war with the offender.

That a violation of neutrality, like any other international delinquency, can only be committed by malice or culpable negligence,<sup>3</sup> and that it can be committed through a State refusing to comply with the consequences of its 'vicarious' responsibility for acts of its agents or subjects,<sup>4</sup> is a matter of course.

Neutrals not to acquiesce in Violations of Neutrality committed by a Belligerent.

§ 360. It is entirely within the discretion of a belligerent whether he will acquiesce in a violation of neutrality committed by a neutral in favour of the other belligerent. On the other hand, a neutral may not exercise the same discretion regarding a violation of neutrality committed by one belligerent and detrimental to the other. His duty of impartiality rather obliges him, in the first instance, to prevent with the means at his disposal the belligerent concerned from committing such a violation; *e.g.* to repulse an attack by men-of-war of a belligerent on enemy vessels in neutral ports. Thus Article 3 of Hague Convention XIII. enacts: 'When a ship has been captured in the territorial waters of a neutral Power, such Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.' But in case he could not prevent and repulse a violation of his neutrality, his same duty of impartiality obliges him to exact

<sup>1</sup> See above, vol. i. § 151.

reprisals or retaliation see *Harvard Research* (1939), pp. 329-333.

<sup>2</sup> See above, vol. i. § 156. On the right of the neutral to resort to

<sup>3</sup> See above, vol. i. § 154.

<sup>4</sup> See above, vol. i. § 150.

due reparation from the offender<sup>1</sup>; for otherwise he would favour the one party to the detriment of the other. If a neutral neglects this obligation, he himself thereby commits a violation of neutrality, for which he may be made responsible by a belligerent who has suffered through the violation of neutrality committed by the other belligerent and acquiesced in by him.<sup>2</sup> For instance, if belligerent men-of-war seize enemy vessels in the ports of a neutral, and if that neutral, who could not or did not prevent this, exacts no reparation from the belligerent concerned, the other party may make the neutral responsible for the losses sustained.

§ 361. Some writers<sup>3</sup> maintain that a neutral is freed from responsibility for a violation of neutrality committed by a belligerent in attacking enemy forces in neutral territory, if the forces attacked, instead of trusting for protection or redress to the neutral, defend themselves against the attack. This rule is adopted from the arbitral award in the case of the *General Armstrong*. In 1814, during war between Great Britain and the United States of America, the American privateer *General Armstrong*, lying in the harbour of Fayal, an island belonging to the Portuguese Azores, defended herself against an attack by an English squadron, but was nevertheless captured. The United States claimed damages from Portugal because the privateer was captured in a neutral Portuguese port. Negotiations went on for many years, and the parties finally agreed in 1851 upon the arbitration by Louis Napoleon, then President of the French Republic. In 1852 Napoleon gave his award in favour of Portugal, maintaining that, although the attack on the privateer in neutral waters comprised a violation of neutrality, Portugal could not be made responsible, because the vessel chose to defend herself instead of demanding protec-

<sup>1</sup> See Articles 25 and 26 of Convention XIII.

<sup>2</sup> For a different view on the matter see *Harvard Research* (1939), pp. 334 and 419-421. It has been pointed out above, § 319, that in case one belligerent resorts to measures which aim at suppressing intercourse between another belligerent and neutrals, and the neutrals are unwilling or unable to

prevent the carrying out of such measures, the injured belligerent is justified in resorting to reprisals and in himself preventing intercourse between neutrals and the offending belligerent.

<sup>3</sup> See, for instance, Hall, § 228, and Geffcken in *Holtzendorff*, iv. p. 701.



tion from the Portuguese authorities.<sup>1</sup> It is, however, not at all certain that the rule laid down in this award will find general recognition in theory and practice.<sup>2</sup>

In March 1915 the German cruiser *Dresden* sought refuge within the territorial waters of Chile near the island of Juan Fernandez, and asked to be allowed to remain there for eight days in order to effect repairs. The request was refused, and the *Dresden* was ordered to depart within twenty-four hours. However, she did not depart, and received notification that she was to be interned. Meanwhile two British cruisers, *Kent* and *Glasgow*, came up and opened fire. The *Dresden* hoisted a flag of truce, and despatched one of her officers to inform the *Glasgow* that she was in neutral territorial waters. In reply, the British squadron called upon her to surrender under a threat of destruction, whereupon she blew herself up and sank. In reply to a Chilean protest against this violation of her neutrality the British Government stated that it was prepared to offer an ample apology; intimating, however, by way of an excuse for the action of the commander of the British squadron, that it was at least doubtful whether the *Dresden* had accepted the internment imposed upon her by the Chilean Government.<sup>3</sup>

Mode of  
exact-  
ing  
Repara-  
tion  
from Bel-  
ligerents  
for Viola-  
tions of  
Neu-  
trality.

§ 362. It is obvious that the duty of a neutral not to acquiesce in violations of neutrality committed by one belligerent to the detriment of the other obliges him to repair, so far as he can, the result of such wrongful acts. Thus, he must liberate<sup>4</sup> a prize taken in his neutral waters, or prisoners made on his territory, and the like. In so far, however, as he cannot, or cannot sufficiently, undo the wrong done, he must exact reparation from the offender. Now, no general rule can be laid down regarding the mode

<sup>1</sup> See Moore, *Arbitrations*, ii. pp. 1071-1132; Calvo, iv. § 2662; Dana's note 208 in Wheaton, § 429; and Scott, *Cases*, 853.

<sup>2</sup> The case of the *Reshitelni*, which occurred in 1904, during the Russo-Japanese War, and is somewhat similar to that of the *General Armstrong*, is discussed above in § 320 (n.). See also the case of the *Variag* and the *Korietz* above, in § 320 (n.).

<sup>3</sup> Details from Garner, ii. § 562.

See also Alvarez, *La grande guerre*, etc. (1915), pp. 227-231, and documents in *A.J.*, x. (1916), Suppl., pp. 72-76; *Jahrbuch des Völkerrechts*, v. pp. 82-87, and Strupp, *Wört.*, i. p. 265. See also the case of the British submarine attacked by a German destroyer in Danish waters, above, § 348a (4). And see above, § 325A, for the case of the *Altmark*.

<sup>4</sup> See Article 3 of Convention XIII.

of exacting such reparation, since everything depends upon the merits of the individual case. However, as regards the capture of enemy vessels in neutral waters, a practice has grown up which must be considered binding, according to which the neutral must claim the prize, and eventually damages, from the belligerent concerned, and must restore her to the other party.<sup>1</sup> Thus, in July 1916, the British steamer *Adams* was captured by a German torpedo boat in Swedish territorial waters, and taken to the German port of Swinemunde; Sweden claimed the prize, and Germany apologised, and brought the vessel back to the spot where she had been captured and set her free.<sup>2</sup> Again, when the German vessels *Pelworm*<sup>3</sup> and others were captured by British cruisers in July 1917, in Dutch territorial waters, the Dutch Government claimed them in the British Prize Court; similarly, Norway claimed the release of the *Düsseldorf*<sup>4</sup> and the *Valeria*,<sup>5</sup> German vessels which had been captured by British forces in Norwegian territorial waters.

<sup>1</sup> Thus in 1800, during war between Great Britain and the Netherlands, Prussia claimed in the British Prize Court the *Twee Gebroeders* (3 C. Rob. 162). The *Twee Gebroeders* was a Dutch vessel captured by the British cruiser *L'Espiegle* in the neutral maritime belt of Prussia. This case is all the more important as the capture was really made outside the neutral maritime belt by boats sent from *L'Espiegle*. *L'Espiegle* was, however, herself within the neutral maritime belt. See *The Vrow Anna Catharina* (No. 1) (1803) 5 C. Rob. 15, for Lord Stowell's classic pronouncement on the 'sanctity of a claim of territory.' Sir William Scott ordered the restoration of the vessel, but refused costs and damages, because the captor had not violated Prussian neutrality intentionally but only by mistake and misapprehension. Thus, again, in 1805, during war between Great Britain and Spain, the United States claimed in the British Prize Court the *Anna* (5 C. Rob. 373: see above, vol. i. § 234), a Spanish vessel captured by the English privateer *Minerva* within her neutral maritime belt. Thus, further, in 1864, during

the American Civil War, when the Confederate cruiser *Florida* was captured by the Federal cruiser *Wachusett* in the neutral Brazilian port of Bahia, Brazil claimed the prize. As the prize had sunk while at anchor in Hampton Roads, she could not be restored; but the United States expiated (see Moore, vii. § 1334) the violation of neutrality committed by her cruiser by court-martialling the commander, by dismissing her consul at Bahia for having advised the capture, and, finally, by sending a man-of-war to the spot where the violation of neutrality had taken place for the special purpose of delivering a solemn salute to the Brazilian flag.

<sup>2</sup> *The Westminster Gazette*, July 21, 1916.

<sup>3</sup> [1920] P. 347; 3 B. and C.P.C. 1033.

<sup>4</sup> [1920] A.C. 1034; 3 B. and C.P.C. 664 (cost of removing the vessel to neutral waters awarded to the Norwegian Government, but no damages or costs).

<sup>5</sup> [1921] 1 A.C. 477; 3 B. and C.P.C. 834 (no damages or costs awarded).

It is, however, only the neutral State whose neutrality has been violated, and not the owner of the vessel, who can, at any rate according to British practice, successfully prosecute a claim for the release of the vessel before the Prize Court.<sup>1</sup>

Negligence on the part of Neutrals.

§ 363. Apart from intentional violations of neutrality, a neutral can be made responsible only for such acts favouring or damaging a belligerent as he could by due diligence have prevented, and which by culpable negligence he failed to prevent. It is by no means obligatory for a neutral to prevent such acts under all circumstances and conditions. This is in fact impossible, and it becomes more obviously so, the larger a neutral State and the longer its boundary lines. So long as a neutral exercises due diligence for the purpose of preventing such acts, he is not responsible in case they are nevertheless performed. However, the meaning of the term *due diligence* has become controversial on account of the definition proffered by the United States of America in interpreting the Three Rules of Washington, and adopted, to a large extent, by the arbitrators.<sup>2</sup> According to that interpretation, the due diligence of a neutral must be in proportion to the risks to which either belligerent may be exposed from failure to fulfil the obligations of neutrality on his part. Had this interpretation been generally accepted, the most oppressive obligations would have become incumbent upon neutrals. But no such general acceptance has taken place. The fact is that *due diligence* in International Law can have no other meaning than it has in Municipal Law. It means such diligence as can reasonably be expected when all the circumstances and conditions of the case are taken into consideration.

Be that as it may, the Second Hague Conference took a step which excluded for the future the continuance of the controversy regarding the interpretation of *due diligence*,

<sup>1</sup> See *The Bangor* [1916] P. 181; 2 B. and C.P.C. 206, and *The Dusseldorf*, *supra*, and the American cases of *The Anne* (1818) 3 Wheaton 435; Scott, *Cases*, 851; *The Lilla* (1862) 2 Sprague 177; Scott, *Cases*, 542; *The Sir William Peel* (1866) 5 Wall. 517; *The Adela* (1867) 6 Wall. 266.

<sup>2</sup> The German and French practice,

however, is different; the capture is absolutely void: see *The Ambrosia*, Fauchille, *Jur. all.*, 131, *The Heina*, Fauchille, *Jur. fr.*, i. 119, and, on appeal, 409; on the whole question see Verzijl, §§ 153-161, and Colombos, §§ 94-104.

<sup>2</sup> See above, § 335.

for Articles 8 and 25 of Convention XIII., instead of stipulating *due diligence* on the part of neutrals, stipulated *the employment of the means at their disposal*.

§ 363a. In order to defend themselves against possible violations of their neutral territory, neutrals may lay automatic contact mines off their coasts. If they do this, they must, according to Article 4 of Convention VIII., observe the same rules and take the same precautions as are imposed upon belligerents.<sup>1</sup> Moreover, they must, according to paragraph 2 of Article 4 of Convention VIII., give notice in advance to mariners of the place where automatic contact mines have been laid, and this notice must be communicated at once to the Governments through diplomatic channels.

Laying of Submarine Contact Mines by Neutrals.

Convention VIII. is quite as indefinite in its rules concerning mines laid by neutrals as in its rules concerning mines laid by belligerents, and the danger to neutral shipping created by mines laid by neutrals is very great. However, when Article 4 speaks of the laying of contact mines by neutral Powers *off their coasts*, without limiting such operations to within the three-mile-wide maritime belt, it does not intend to give neutrals a right to lay them outside the belt. For it is expressly stated<sup>2</sup>: 'Mais il paraîtrait entendu que l'absence de toute disposition fixant les limites dans lesquelles les neutres peuvent placer des mines ne devra pas être interprétée comme établissant, pour les neutres, le droit de placer des mines en pleine mer.'

A neutral, in laying mines within his territorial waters, must have regard to the duty of impartiality incumbent upon him, and must consider whether his mine-field favours one belligerent at the expense of another.<sup>3</sup>

<sup>1</sup> See above, § 182a.

<sup>2</sup> See *Deuxième Conférence, Actes*, iii. p. 456. See also Article 6 of the 'Réglementation internationale de l'usage des mines sous-marines et des torpilles' of the Institute of International Law (*Annuaire*, xxiv. (1911) p. 302); *Harvard Research* (1939), pp. 754-756.

<sup>3</sup> On July 14, 1916, during the World War, Sweden declared that the Kogrund Channel, leading to the Baltic Sea, was to be closed by mines, and that only Swedish shipping

might pass through it. The channel was within Swedish territorial waters. The effect of this action was to force Allied ships entering or leaving the Baltic to pass through the outer channels, which were closely patrolled by German warships. Thus while German ships had access to both the east and west coasts of Sweden, Russia was confined to the east coast and the other Allied Powers to the west, Sweden having completed the German barrier between them. The Allied Powers protested.

## IX

## RIGHT OF ANGARY

Grotius, iii. c. 17, § 1 (see also ii. c. 2, §§ 6-9)—Vattel, ii. § 121—Hall, § 278—Lawrence, § 233—Westlake, ii. pp. 131-134—Phillimore, iii. § 29—Halleck, i. pp. 519-520—Taylor, § 641—Walker, § 69—Bluntschli, § 795a—Heffter, § 150—Bulmerincq in *Holtzendorff*, iv. pp. 98-103—Geffcken in *Holtzendorff*, iv. pp. 771-773—Ullmann, § 192—Fauchille, §§ 1490 (5)-1490 (9)—Despagnet, No. 494—Mérignhac, iii<sup>a</sup>. pp. 586-591—Rivier, ii. pp. 327-329—Kleen, ii. §§ 165, 230—Perels, § 40—Hautefeuille, iii. pp. 416-426—Holland, *War*, Nos. 139-140—Hatschek, pp. 359-362—Rolin, §§ 1143-1150—Hyde, ii. §§ 594 (n.), 633-637—Strisower in *Strupp*, *Wört.*, i. pp. 53-55—Verzijl, §§ 712-715—Spaight, *Air*, pp. 463-465—Colombos, §§ 252-254—*Land Warfare*, §§ 507-510—Albrecht, *Requisitionen von neutralem Privateigentum, insbesondere von Schiffen* (1912), pp. 24-66—Wehberg, p. 70—Borchard, § 104—Garner, i. §§ 118-119—*Harvard Research* (1939), pp. 359-385—Genet, §§ 176-201—Harley in *A.J.*, xiii. (1919) pp. 267-301—Rolin in *R.I.*, 3rd ser., i. (1920) pp. 19-33—Bullock in *B.Y.*, 1922-1923, pp. 99-129 (an exhaustive and valuable study)—Jennings in *Cambridge Law Journal*, iii. (1927-1929) pp. 49-58.

The  
Original  
Right of  
Angary.

§ 364. Under the term *jus angariae*,<sup>1</sup> belligerents who had not sufficient vessels often claimed and practised in former times the right to lay an embargo on, and seize, neutral merchantmen in their harbours, and to compel them *and their crews* to transport troops, munitions, and provisions to certain places on payment of freight in advance.<sup>2</sup> This practice arose in the Middle Ages,<sup>3</sup> and was much resorted to by Louis XIV. of France. To save the vessels of their subjects from seizure under this right of angary, States began in the seventeenth century to conclude treaties under which each renounced the right with regard to the vessels of the other. And so the right fell into disuse during the eighteenth century, and there is no case in which it is reported to have been exercised during the nineteenth century.<sup>4</sup> Nevertheless, many writers<sup>5</sup> assert that it is not obsolete, and might be exercised even in this twentieth

<sup>1</sup> The term *angaria*, which in mediaeval Latin means *post-station*, is a derivation from the Greek term ἀγγαρος for messenger. *Jus angariae* would therefore literally mean a right of transport.

<sup>2</sup> See above, § 40.

<sup>3</sup> On the origin and development of

the *jus angariae* see Albrecht, *op. cit.*, pp. 24-37, and Bullock, *op. cit.*

<sup>4</sup> See, however, Bullock, *op. cit.*, pp. 111-113.

<sup>5</sup> See, for instance, Phillimore, iii. § 29; Calvo, iii. § 1277; Heffter, § 150; Perels, § 40; Rivier, ii. p. 323; Despagnet, No. 494.

century. They do this because, even during the nineteenth century, some States concluded treaties<sup>1</sup> containing articles which provided for compensation in case this right of angary should be exercised by one of the contracting parties. On the other hand, there is evidence that the right is contested. A number of writers<sup>2</sup> object to it.

Considering that no case of the use of this right of angary happened in the nineteenth century,<sup>3</sup> and that International Law concerning the rights and duties of neutrals became much more developed during the eighteenth and nineteenth centuries, in the first and second editions of this work I ventured the assertion that this right of angary 'is now probably obsolete.' However, although no real case occurred during the World War—the requisitioning of Dutch ships by the Allies in March 1918 being a case of the modern right of angary as discussed below<sup>4</sup>—that war has shown that belligerents will not easily renounce the use of any right unless it is absolutely clear that it does not exist, or no longer exists. For this reason it cannot with certainty be said that the right is obsolete.

The requisitioning during the World War of some Swedish and Dutch steamers lying in English and French harbours, against which the Swedish and Dutch<sup>5</sup> Governments protested, had nothing to do with the right of angary, whatever may have been the merits of the case. The British Government did indeed requisition a number of Swedish ships—the *Sphinx*, the *Bellgrove*, the *Phyllis*, and the *Cremona*,—and of Dutch ships—the *Vembergen*, *Kelhergen*, and others,—and

<sup>1</sup> See Albrecht, *op. cit.*, pp. 34-37.

<sup>2</sup> See, for instance, Bulmerincq in *Holtendorff*, iv. pp. 98-103; Lawrence, § 233; Kleen, ii. § 165. Article 39 of the 'Règlement sur le Régime légal des Navires dans les Ports étrangers,' adopted by the Institute of International Law (see *Annuaire*, xvii. (1898) p. 284), rejects it: 'Le droit d'angarie est supprimé. . . . The King's Regulations and Admiralty Instructions of 1908 (No. 494) contain the following rules under the heading 'Coercion of a British ship': 'If any British merchant-ship, the nationality of which is unquestioned,

should be coerced into the conveyance of troops or into taking part in other hostile acts, the Senior Naval Officer, should there be no diplomatic or consular authority at the place, is to remonstrate with the local authorities and take such other steps to assure her release or exemption as the case may demand, and as may be in accordance with these Regulations.'

<sup>3</sup> See, however, Bullock, *op. cit.*, pp. 111-113.

<sup>4</sup> § 365.

<sup>5</sup> Parl. Papers, Misc. No. 5 (1918), Cmd. 8986.

paid compensation for their use. But the public statement made by the British Government on October 11, 1917, did not base this requisitioning upon the right of angary.<sup>1</sup>

Be that as it may, the original right of angary not only empowered a belligerent to requisition *neutral ships* for military purposes, but also to compel the *neutral crews* to render services by which they acquired enemy character.

The  
Modern  
Right of  
Angary.

§ 365. In contradistinction to this original right of angary, the modern right of angary is a right of belligerents to destroy, or use, in case of necessity, for the purpose of offence and defence, neutral property on their territory, or on enemy territory, or on the open sea.<sup>2</sup> This modern right of angary does not, as did the original right, empower a belligerent to compel neutral individuals to render services, but only extends to neutral property. In case property of subjects of neutral States is vested with enemy character,<sup>3</sup> it is not neutral property in the strict sense of the term 'neutral,' and all the rules respecting appropriation, utilisation, and destruction<sup>4</sup> of enemy property obviously apply to it. The object of the right of angary is, therefore, either such property of subjects of neutral States as retains its neutral character from its temporary position on belligerent territory, and which therefore is not vested with enemy character, or such neutral property on the open sea as has not acquired enemy character. All sorts of neutral property,

<sup>1</sup> There are, however, passages in the correspondence with the Dutch Government which do seek to justify the requisitioning by reference to the right of angary, though the term is not used. See also Winfield in Lawrence, § 233.

<sup>2</sup> See, however, Rolin, § 1149, who points out that according to the almost unanimous opinion of writers the exercise of the right of angary on the open sea is inadmissible. Bullock, *op. cit.*, p. 124, also points out that the right of angary, inasmuch as it rests on territorial sovereignty, cannot be exercised upon the open sea or in occupied enemy territory; requisitions of neutral property on the high seas or on occupied enemy

territory must (according to Bullock, *op. cit.*) find their justification, if at all, in military necessity, and not in angary. But see *Katrantsios v. Bulgaria*, decided by the Greco-Bulgarian Mixed Arbitral Tribunal, *Annual Digest*, 1925-1926, Case No. 346. In *Commercial Estates Co. of Egypt v. Board of Trade* [1925] 1 K.B. 271, the neutral property, timber, was brought into British jurisdiction by a British ship without the consent and against the protest of the owner of the timber, and then requisitioned.

<sup>3</sup> See above, § 90.

<sup>4</sup> See the case of *William Hardman*, above, § 170 (n.).

whether it consists of vessels or other <sup>1</sup> means of transport,<sup>2</sup> or arms, ammunition, provisions, or other personal property, may be the object of the right of angary, provided it is serviceable to military ends and wants. The conditions under which the right may be exercised are the same as those under which private enemy property may be utilised or destroyed ; but in every case the neutral owner must be fully indemnified.<sup>3</sup>

However, it may safely be maintained that a duty to pay compensation for any damage done in the exercise of the right of angary must nowadays be recognised. Article 53 of the Hague Regulations stipulates the payment of indemnities for the seizure and utilisation of all appliances adapted to the transport of persons or goods which are the private property of inhabitants of occupied enemy territory, and Article 52 of the Hague Regulations stipulates payment for requisitions ; since in these articles the immunity from confiscation of the private property of the inhabitants is recognised, all the more must that of private neutral property temporarily on occupied enemy territory be recognised also.

During the World War, on March 20, 1918, the United States of America, by a proclamation <sup>4</sup> reciting that the law and practice of nations accorded to a belligerent Power the right in time of military exigency and for purposes essential to the prosecution of the war to take over and utilise neutral

<sup>1</sup> Thus in 1870, during the Franco-German War, the Germans seized hundreds<sup>4</sup> of Swiss and Austrian railway carriages in France and used them for military purposes.

<sup>2</sup> Including neutral private aircraft : see Spaight, *Air*, p. 463.

<sup>3</sup> See Article 6 of U.S. Naval War Code : ' If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed, or otherwise used for military purposes, but in such cases the owners of the neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed upon in advance with the owner or master of the vessel. Due regard must be had to treaty stipulations upon these matters.' See also

Holland, *War*, No. 140. A remarkable case occurred in 1871 during the Franco-German War. The Germans seized some British coal-vessels lying in the River Seine at Duclair, and sank them for the purpose of preventing French gunboats from running up the river. On the intervention of the British Government, Count Bismarck refused to recognise the duty of Germany to indemnify the owners of the vessels sunk, although he agreed to do so. See Albrecht, *op. cit.*, pp. 45-48. For a somewhat similar incident in the World War see note in *Journal of Comparative Legislation*, 3rd ser., i. (1919) pp. 251-257.

<sup>4</sup> Text in *A.J.*, xii. (1918), Suppl., p. 259.



vessels lying within its jurisdiction, requisitioned seventy-seven Dutch vessels lying in American harbours,<sup>1</sup> and undertook to make full compensation to the owners. On the following days, Great Britain,<sup>2</sup> France, and Italy followed suit.<sup>3</sup>

The Dutch crews belonging to the ships requisitioned by the Associated Governments were not compelled to continue to serve, although many of them did so voluntarily.

During the World War, English courts<sup>4</sup> recognised the right of a belligerent to requisition neutral property within the jurisdiction subject to compensation, and applied the term 'angary' to the exercise of this right. They did not limit its exercise to ships and other means of transport, and applied it in the case of timber and copper required for the purpose of the successful prosecution of the war 'or other matters of national security.'<sup>5</sup>

<sup>1</sup> See Scott in *A.J.*, xii. (1918) pp. 340-356; Wilson, *ibid.*, xxiv. (1930) pp. 694-702. And see on the status of the vessels thus requisitioned the Opinion of Parker, Umpire, in the matter of the S.S. *Merak* and *Tezel*: United States and Germany, Mixed Claims Commission: *A.J.*, xviii. (1924) p. 614; *Annual Digest*, 1923-1934, Case No. 226. See also *Royal Holland Lloyd v. The United States*, decided in 1931 by the United States Court of Claims: 73 Ct. Cl. 722; *Annual Digest*, 1931-1932, Case No. 229.

<sup>2</sup> Parl. Papers, Misc. No. 11 (1918), Cmd. 9025, p. 2.

<sup>3</sup> On March 30, 1918, the Dutch Government protested against the interpretation given to the right of angary, 'an ancient rule unearthed for the occasion and adapted to entirely new conditions in order to excuse seizure *en masse* by a belligerent of the merchant fleet of a neutral country.' To this protest, on April 25, 1918, the British Government replied in a memorandum which discussed in detail the modern right of angary in International Law (*ibid.*, p. 6). See also the case of the taking over by the Government of the United States, on becoming a belligerent in 1917, of a number of contracts between Norwegian sub-

jects and American shipbuilders in the United States, which was 'a requisitioning by the exercise of the power of eminent domain within the meaning of American Municipal Law.' For the award in the ensuing United States-Norway Arbitration, see *A.J.*, xvii. (1923) pp. 362-399, and the comments of the American Government upon it, *ibid.*, pp. 287-290.

<sup>4</sup> *The Zamora* [1916] 2 A.C. 77; 2 B. and C.P.C. 1; *The Canton* [1917] A.C. 102; 2 B. and C.P.C. 264; *Commercial Estates Co. of Egypt v. Ball* (1920) 36 T.L.R. 526; and *Commercial Estates Co. of Egypt v. Board of Trade* [1925] 1 K.B. 271, where the neutral property requisitioned by the Crown in pursuance of the right of angary was brought within British jurisdiction without the consent and against the protest of the owners: see comments on this case in *Netherlands-American Steam Navigation Co. v. H.M. Procurator-General* [1926] 1 K.B. at pp. 95 and 99.

<sup>5</sup> Where the neutral property requisitioned is in the custody of the Prize Court awaiting adjudication, the judgment of the Privy Council in the *Zamora* requires that three conditions must exist: (1) urgent need for the purposes above mentioned; (2) that 'there must be a real question

§ 366. A special case of the right of angary found recognition by Article 19 of Convention V. of the Second Hague Conference, which enacted that railway material coming from the territory of a neutral Power, whether belonging to the neutral State or to companies or private persons, shall not be requisitioned or utilised by a belligerent, *except in the case of, and to the extent required by, absolute necessity*; that it shall as soon as possible be sent back to the country of origin; and that compensation shall be paid for its use.<sup>1</sup> This article also gives a right to a neutral Power, whose railway material has been requisitioned by a belligerent, to retain and make use of, to a corresponding extent, railway material coming from the territory of the belligerent concerned.

§ 367. Whatever the extent of the right of angary may be, it does not derive from the law of neutrality. The correlative duty of a belligerent to indemnify the neutral owner of property appropriated or destroyed in the exercise of the right of angary does indeed derive from the law of neutrality. But the right of angary itself is rather a right deriving from the law of war. As a rule, the law of war only gives the right to a belligerent, under certain circumstances and conditions, to seize, make use of, or destroy the private property of the inhabitants of occupied enemy territory; but under other circumstances and conditions, and very exceptionally, it likewise gives a belligerent the right to seize, use, or destroy neutral property temporarily on occupied enemy territory, on his own territory, or on the open sea.<sup>2</sup>

The right of angary being a right deriving from the law of

to be tried so that it would be improper to order an immediate release'; and (3) that 'the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable': [1916] 2 A.C. at p. 106; 2 B. and C.P.C. at p. 26. See also the *Pomona*, *The Times* newspaper, of November 2, 1939. As to the right under English law of requisitioning the property of its own subjects by the Crown in Great

Britain see *Att.-Gen. v. De Keyser's Royal Hotel Limited* [1920] A.C. 508, and Scott and Hildesley, *The Case of Requisitions* (1920); and, as regards British ships at home and abroad, Holdsworth in *Law Quarterly Review*, xxxv. (1919) pp. 12-42.

<sup>1</sup> See Nowacki, *Die Eisenbahnen im Kriege* (1906), pp. 115-126; Albrecht, *op. cit.*, pp. 22-24; and Rolin, §§ 1045-1048.

<sup>2</sup> See, however, the criticism on this view, above, in § 365 (n.).

war, it must not be confused with the right, which every State undoubtedly possesses, of seizing in case of emergency, and subject to compensation, any foreign property on its territory. One ought not therefore to speak of a right of angary belonging to neutrals<sup>1</sup> as well as to belligerents, or of a right of angary in peace as well as war.<sup>2</sup>

<sup>1</sup> As does Basdevant in *R.G.*, xxiii. (1916) pp. 268-279, and Fauchille, § 1940 (b). See also Garner, i. § 120; Liszt, § 66 (iv.) (n.); Hatschek, p. 362.

<sup>2</sup> Bullock, *op. cit.*, concludes an admirable study of this difficult topic by stating the essential features of the modern law of angary to be as follows: '(a) It is the right of a State to requisition foreign ships, aircraft, and other means of transport which (b) are urgently required for purposes of transport, and which (c) are at the time of requisition

within its territorial jurisdiction; but such requisitions can only be made (d) in time of national emergency, and (e) subject to payment of full compensation, whilst (f) the services of foreign *personnel* (as, for example, the crews of ships and aircraft) cannot be compelled in any circumstances.' But it will be noted from the English decisions cited above, § 365, that the Privy Council and the Court of Appeal did not limit angary to the requisitioning of means of transport.

# CHAPTER III

## BLOCKADE

### I

#### CONCEPTION OF BLOCKADE

Grotius, iii. c. 1, § 5—Bynkershoek, *Quaestiones Juris publici*, i. c. 11—Vattel, iii. § 117—Hall, §§ 233, 257-266—Lawrence, §§ 246-252—Westlake, ii. pp. 255-276, and *Papers*, pp. 312-361—Maine, pp. 107-109—Manning, pp. 400-412—Phillimore, iii. §§ 285-321—Twiss, ii. §§ 98-120—Halleck, ii. pp. 210-242—Taylor, §§ 674-684—Walker, §§ 76-82—Wharton, iii. §§ 359-365—Moore, vii. §§ 1266-1286—Wheaton, §§ 509-523—Hershey, Nos. 477-495—Bluntschli, §§ 827-840—Heffter, §§ 154-157—Geffcken in *Holtzendorff*, iv. pp. 738-771—Ullmann, § 182—Fauchille, §§ 1589-1656 (26)—Despagnet, Nos. 620-640—Pradier-Fodéré, vi. Nos. 2776-2779, and viii. Nos. 3109-3152—Nys, iii. pp. 165-196, 691-694—Rivier, ii. pp. 288-298—Calvo, v. §§ 2827-2908—Fiore, iii. Nos. 1606-1629—Martens, ii. § 124—Pillet, pp. 129-144—Kleen, i. §§ 124-139—Ortolan, ii. pp. 292-336—Hautefeuille, ii. pp. 189-288—Gessner, pp. 145-227—Perels, §§ 48-51—Testa, pp. 221-229—Dupuis, Nos. 159-198, and *Guerre*, Nos. 113-136—Boeck, Nos. 670-726—Holland, *Prize Law*, §§ 106-140, and *Lectures*, pp. 512-529—Keith's Wheaton, pp. 1092-1122—U.S. Naval War Code, Articles 37-45—Bernsten, § 10—Nippold, ii. § 32—Schramm, § 9—Hyde, ii. §§ 824-843—Fenwick, pp. 537-542—Rolin, §§ 1177-1200—De Louter, ii. pp. 451-461—Suarez, §§ 420-431—Cruchaga, §§ 1294-1309—Hatschek, pp. 349-352—Liszt, § 64 A—Gemma, pp. 383-386—Balladore Pallieri, pp. 449-466—Kunz, pp. 135-151—Genet, §§ 512-569—Pohl in *Strupp, Wört.*, i. pp. 143-147, 203-205—Verzijl, §§ 529-545—Garner, *Prize Law*, Nos. 451-463—Baty, pp. 231-248, 343-349—Butler and Maccoby, *The Development of International Law* (1928), pp. 296-308—*Letters by Historicus* (1863), pp. 89-118—*Additional Letters by Historicus* (1863), pp. 3-12 and 25-44—Bargrave Deane, *The Law of Blockade* (1870)—Fauchille, *Du blocus maritime* (1882)—Carnazza-Amari, *Del blocco marittimo* (1897)—Frémont, *De la saisie des navires en cas de blocus* (1899)—Guynot-Boissière, *Du blocus maritime* (1899)—§§ 35-44 of the 'Règlement international des prises maritimes' (*Annuaire*, ix. (1887) p. 218), adopted by the Institute of International Law—Atherley-Jones, *Commerce in War* (1907), pp. 92-252—Söderquist, *Le blocus maritime* (1908)—Hansemann, *Die Lehre von der einheitlichen Reise im Rechte der Blockade und Kriegskonterbande* (1910)—Güldenagel, *Verfolgung und Rechtsfolgen des Blockadebruchs* (1911)—Hirschmann, *Das internationale Priserecht* (1912), §§ 17-23—Wehberg, pp. 138-172—Piggott, *The Neutral Merchant* (1913)—Halsbury, *The Laws of England*, xxiii. (1912) pp. 279-281—

Baty, *Prize Law and Continuous Voyage* (1916)—Adam, *Le blocus maritime, la contrebande de guerre et la guerre mondiale* (1917)—Triepel, *Konterbande, Blockade, Seesperre* (1918)—Poulachon, *L'évolution de la pratique du blocus et du régime de la contrebande au cours de la guerre actuelle* (1918)—Alessandri, *Contribution à l'étude des blocus nouveaux* (1919)—Raulin, *Le blocus* (1919)—Spaight, *Air*, pp. 396-400—Laurens, *Le blocus et la guerre sous-marine, 1914-1918* (1924)—Jessup and Deák, *Neutrality*, vol. i., *The Origins* (1935), pp. 105-123—Colombos, §§ 203-225—Kennedy in the *Journal of Comparative Legislation*, New Ser., ix. (1908) pp. 239-251—Myers in *A.J.*, iv. (1910) pp. 571-595—General Report presented to the Naval Conference of London by its Drafting Committee, Articles 1-21—Holtzoff in *A.J.*, x. (1916) pp. 53-64—*Harvard Research* (1939), pp. 619-637, 714-750.

Definition  
of  
Blockade.

§ 368. Blockade is the blocking by men-of-war<sup>1</sup> of the approach to the enemy coast, or a part of it, for the purpose of preventing ingress and egress of vessels or aircraft<sup>2</sup> of all nations.<sup>3</sup> Blockade must not be confused with siege, although it may take place concurrently with siege. Whereas siege aims at the capture of the besieged place, blockade endeavours merely to intercept all intercourse, and especially commercial intercourse, by sea between the coast and the world at large. Although blockade is, as shown above,<sup>4</sup> a means of warfare against the enemy, it concerns neutrals as well, because the ingress and egress of neutral vessels are thereby interdicted, and may be punished.<sup>5</sup>

Blockade in the modern sense of the term is an institution which could not develop until neutrality was in some form a recognised institution of the Law of Nations, and until

<sup>1</sup> When in 1861, during the American Civil War, the Federal Government blocked the harbour of Charleston by sinking ships laden with stone, the question arose whether a so-called stone blockade is lawful. There ought to be no doubt (see below, § 380) that such a stone blockade is not a blockade in the ordinary sense of the term, and that neutral ships may not be seized and confiscated for having attempted egress or ingress. But, on the other hand, there ought to be no doubt either that this mode of obstructing an enemy port is as lawful as any other means of sea warfare, provided the blocking of the harbour is made known, so that neutral vessels can avoid the danger of being wrecked. See Wharton, iii. § 361a; Fauchille, *Blocus*, pp. 143-145; Perels, § 35,

p. 187. On the Charleston 'stone-blockade' see also Adams, *Great Britain and the American Civil War* (1925), i. pp. 253-258. The blocking of Zeebrugge by British forces in 1918 by means of sinking ships filled with cement affords an illustration of obstructing an enemy-occupied port for purely military and naval purposes.

<sup>2</sup> See Spaight, *Air*, p. 396.

<sup>3</sup> Hall, § 257, states that the analogous operation of intercepting access to a place by land 'calls for no special rules for its maintenance; sovereignty in some cases and military occupation in others supply the requisite rights of control.'

<sup>4</sup> §§ 173-174.

<sup>5</sup> As regards the so-called 'long-distance blockade' see below, §§ 390a-390b.

the freedom of neutral commerce was in some form guaranteed. The institution of blockade dates from 1584 and 1630, when the Dutch<sup>1</sup> Government declared all the ports of Flanders in the power of Spain to be blockaded; but it has taken several hundred years for it to reach its present condition, since, until the beginning of the nineteenth century, belligerents frequently made use of so-called paper blockades. These are no longer valid, a blockade now being binding only if effective.

It is on account of the practical importance of blockade to the interests of neutrals that it is more conveniently treated with neutrality than with war. But blockade as a means of warfare must not be confused with so-called pacific blockade, which is a means of compulsive settlement of State differences.<sup>2</sup>

Apart from the stipulation of the Declaration of Paris that a blockade to be binding must be effective, no conventional rules concerning blockade are in existence, nor is the practice of the States governed by common rules covering all points. Articles 1-21 of the Declaration of London did indeed offer a code of the law of blockade; but this Declaration remained unratified; and although, as has already been stated,<sup>3</sup> at the outbreak of the World War the Allies adopted all these articles with certain modifications relating to presumed knowledge of the existence of a blockade, the British Maritime Rights Order in Council of July 7, 1916, and the corresponding French decree, abandoned the Declaration altogether.

§ 369. A blockade is termed *strategic* if it forms part of other military operations directed against the coast which is blockaded, or if it be declared in order to cut off supplies from enemy forces on shore. In contradistinction to strategic blockade, one speaks of a *commercial* blockade.

<sup>1</sup> See Fauchille, *Blocus*, pp. 2-6, and Westlake, *Papers*, pp. 325-337.

<sup>2</sup> See above, §§ 44-49. It must also be distinguished from the policing of territorial waters to intercept access to insurgents; for instance, the Franco-Spanish operations off a part of the coast of Morocco and

in the waters of the Tangier zone; see London *Times* newspaper, July 1, 1925. For an instance of what might be termed 'self-blockade,' that is, a blockade by a State of its own coasts to repress insurgency, see Westlake, ii. p. 12.

<sup>3</sup> Above, § 292.

when it is declared simply in order to cut off the coast from intercourse with the outside world, and no military operations take place on shore. That commercial blockades are, according to the present rules of International Law, as legitimate as strategic blockades is not generally denied. But several writers<sup>1</sup> maintained before the World War that blockades which are purely commercial ought to be abolished as not being in accordance with the guaranteed freedom of neutral commerce during war.

Blockade  
to be Uni-  
versal as  
regards  
Vessels  
excluded.

§ 370. A blockade is really in being when vessels of all nations are interdicted and prevented from ingress or egress. Blockade as a means of warfare is admissible only in the form of a *universal* blockade; that is—to borrow the language of Article 5 of the unratified Declaration of London—it ‘must be applied impartially to the vessels of all nations.’ If the blockading belligerent were to allow the ingress or egress of vessels of one nation, no blockade would exist.<sup>2</sup>

On the other hand, provided that a blockade is universal, a special licence for ingress or egress may be given to a particular vessel and for a particular purpose,<sup>3</sup> and men-of-war of all neutral nations may be allowed to pass to and fro unhindered.<sup>4</sup> Thus, when during the American Civil War the Federal Government blockaded the coast of the Confederate States, neutral men-of-war were not prevented from ingress and egress. But a belligerent has a *right* to prevent neutral men-of-war from passing through the line of blockade, and it is entirely within his discretion whether or not he will admit or exclude them; nor is he compelled

<sup>1</sup> See Hall, § 233, and Westlake, *Papers*, pp. 313-361; but later Westlake (ii. p. 263) withdrew his opposition to commercial blockades. (Such is the author's note. But Westlake's acquiescence was at any rate given grudgingly; see *Papers*, p. 615.)

<sup>2</sup> *The Rolla* (1807) 6 C. Rob. 364; *The Franciska* (1855) Spinks 287. See also below, § 382. And see *Harvard Research* (1939), pp. 716-719.

<sup>3</sup> This exception to the general rule was not mentioned by the unratified Declaration of London.

<sup>4</sup> Recognised by Article 6 of the

unratified Declaration of London. In 1915 the Greek vessel *Aghios Nicolaos* was allowed by the French blockading squadron to proceed to Hieronda on the blockaded coast of Asia Minor in order to bring away a number of refugees to Samos. The vessel, however, availed herself of this opportunity to take to Hieronda a cargo consisting of a number of horses. The animals were seized by the French authorities and the seizure pronounced valid by the Conseil des Prises: see Fauchille, *Jur. fr.*, p. 450.

to admit them all, even though he has admitted one or more of them.

§ 371. As a rule, a blockade is declared for the purpose of preventing ingress as well as egress. But sometimes only ingress, or only egress, is prevented. In such cases one speaks of 'blockade inwards' and of 'blockade outwards' respectively. Thus the blockade of the mouth of the Danube declared by the Allies in 1854, during the Crimean War, was a 'blockade inwards,' since the only purpose was to prevent supplies from reaching the Russian Army from the sea.<sup>1</sup>

§ 372. In former times it was sometimes asserted that only ports, or even only fortified ports,<sup>2</sup> could be blockaded; but the practice of the States has always shown that single ports and portions of an enemy coast, as well as the whole of the enemy coast, may be blockaded. Thus during the American Civil War the whole of the coast of the Confederate States to the extent of about 2500 nautical miles was blockaded. Attention must also be drawn to the fact that such ports of a belligerent as are in the hands of the enemy may be the object of a blockade. Thus during the Franco-German War the French blockaded<sup>3</sup> their own ports of Rouen, Dieppe, and Fécamp, which were occupied by the Germans. Article 1 of the unratified Declaration of London indirectly sanctioned this practice by enacting that 'a blockade must not extend<sup>4</sup> beyond the ports and coasts belonging to or occupied by the enemy.'

§ 373. A river which is purely 'national,'<sup>5</sup> that is, one which lies wholly from its source to its mouth within the territory of one and the same State, may be blockaded by the enemy of that State. But those rivers which have been called 'boundary rivers' and 'not-national<sup>6</sup> rivers,' since

Blockade,  
Outwards  
and  
Inwards.

What  
Places  
can be  
Block-  
aded.

Blockade  
of Rivers.

<sup>1</sup> *The Gerasimo* (1857) 11 Moore P.C. 88.

<sup>2</sup> Napoleon I. maintained in his Berlin Decrees: 'Le droit de blocus, d'après la raison et l'usage de tous les peuples policés, n'est applicable qu'aux places fortes.'

<sup>3</sup> See Fauchille, *Blocus*, p. 161.

<sup>4</sup> The so-called 'long-distance blockade' (see below, §§ 390a-390b) is of course essentially a blockade

extending beyond the coast of the enemy.

<sup>5</sup> See above, vol. i. § 176. See also Fauchille, §§ 1618-1620; Smith, *Great Britain and the Law of Nations* (ii. 1935), pp. 360-368; Accioli in *Iowa Law Review*, xix. (1933-1934) pp. 231-236; Abraham in *Z.V.*, xxiii. (1939) pp. 49-63.

<sup>6</sup> Or 'multi-national' rivers.



they are not owned by one and the same State, but by two or more States, cannot, it is submitted, lawfully be blockaded except when all the riparian States are co-belligerents against the blockading State, or when they are all belligerents and the co-belligerents of the blockading State assent to the blockade. The position of 'boundary' and 'not-national' <sup>1</sup> rivers cannot be regarded as definitely settled, but the precedents tend to support the view stated above. Thus, when in 1854, during the Crimean War, the Allied fleets of Great Britain and France blockaded the mouth of the Danube, Bavaria and Würtemberg, which remained neutral, protested. When, in 1870, the French blockaded the whole of the German coast of the North Sea, they exempted the Dollart, the mouth of the River Ems, because the Dollart separates the Dutch province of Groningen from German territory. Again, when in 1863, during the blockade of the coast of the Confederate States, the Federal cruiser *Vanderbilt* captured the British vessel *Peterhoff* <sup>2</sup> destined for Matamoros, on the Mexican shore of the Rio Grande, the American courts released the vessel on the ground that trade with Mexico, which was neutral, could not be prohibited.

Different again is the type of river which has been called 'international' <sup>3</sup>—that is, a river the navigation of which has been declared free and open to the vessels of all nations and placed under some form of international guarantee; for instance, the Scheldt, the Rhine, the Danube since 1856, and many rivers under the Treaty of Versailles. In some cases the provisions of particular conventions may throw light upon the question of immunity from blockade; apart from any such provisions, it is submitted that, whether 'international' rivers flow solely through the territory of one and the same State or between or through the territory of two or more States, their public and international status should make it impossible to subject their mouths to a lawful blockade.<sup>4</sup> Particularly ought this to be the rule in

<sup>1</sup> Or 'multi-national' rivers.

<sup>2</sup> (1866) 5 Wall. 49. See Fauchille, *Blocus*, pp. 171-183; Phillimore, iii. § 293a; Hall, § 266; Rivier, ii. p. 291.

<sup>3</sup> See above, vol. i. § 176.

<sup>4</sup> The Declaration of London, had it been ratified, would only have settled the controversy as regards one point. By enacting that 'the blockading forces must not bar

the case of 'international' rivers, for instance the Danube<sup>1</sup> or the Rhine, which pass through several States between their sources and their mouths at the sea coast, when one or more of the upper riparian States remain neutral.

§ 373a. Similar to, but not identical with, the question <sup>Blockade of Straits.</sup> whether the mouth of an international river may be blockaded, is the question whether territorial straits<sup>2</sup> may be blockaded. Three cases must be distinguished:

(1) Straits which only separate territory belonging to one and the same State, and do not connect two parts of the open sea (e.g. the Solent), may certainly be blockaded.

(2) When straits separate territory belonging to one and the same State, and at the same time connect two parts of the open sea, the question whether they can be blockaded is unsettled.<sup>3</sup> During the Turco-Italian War in 1911, Italy did not declare a blockade of the Dardanelles, which belonged to this class of straits. The Dardanelles and the Bosphorus are now regulated by Articles 4-6 and 19-21 of the Convention of Montreux of 1936<sup>4</sup>; the general effect of which appears to be that no State which is a party to the Convention could lawfully blockade those places.<sup>5</sup> But the general legal position of straits of this kind as regards blockade still remains open.<sup>6</sup>

(3) Unsettled also is the case in which straits divide two different States.<sup>6</sup>

§ 373b. There would appear to be no reason why the <sup>Blockade of Canals</sup> mouth of a canal which runs through the territory of one State only and is exclusively within its control should not

access to neutral ports or coasts,' Article 18 would certainly have prohibited the blockade of the whole mouth of a 'boundary' river between a neutral and a belligerent State, as, for instance, the River Rio Grande in case the United States of America was at war and Mexico remained neutral.

<sup>1</sup> As to the position during the World War see Blociszewski in *Hague Recueil*, 1926 (i.), pp. 315-319. See also Laun, *ibid.* (v.), pp. 131-134.

<sup>2</sup> See on the position of straits generally, Wilson, *Les eaux adja-*

*centes au territoire des états*, in *Hague Recueil*, 1923 (i.), pp. 159-163.

<sup>3</sup> Baty in *Jahrbuch des Völkerrechts*, i. (1913) pp. 630-639.

<sup>4</sup> See above, vol. i. § 197.

<sup>5</sup> Article 5 of the Convention provides that in wars in which Turkey is a belligerent neutral vessels shall enjoy freedom of transit and navigation in the Straits on condition that they do not in any way assist the enemy.

<sup>6</sup> See Fauchille, § 1620; *Harvard Research* (1939), pp. 692-694.

be blockaded in the same way as the mouth of a river similarly situated may be blockaded.<sup>1</sup> But inter-oceanic canals are usually regulated by special conventions. Thus the Suez Canal<sup>2</sup> and the Panama Canal<sup>3</sup> cannot lawfully be blockaded, at any rate by a party to the conventions regulating them. The Kiel Canal,<sup>4</sup> as affected by Articles 380-386 of the Treaty of Versailles, was likened by the Permanent Court of International Justice to natural straits connecting two open seas, the position of which as regards blockade is, as we have seen,<sup>5</sup> unsettled.

Justifica-  
tion of  
Blockade.

§ 374. The question has been raised in what way blockade, which vests in a belligerent a certain jurisdiction over neutral vessels, and has detrimental consequences for neutral trade, can be justified.<sup>6</sup> Several writers, following Hautefeuille,<sup>7</sup> maintain that the establishment of a blockade by a belligerent stationing a number of men-of-war so as to block the approach to the coast amounts to conquest of that part of the sea, and that such conquest justifies a belligerent in prohibiting ingress and egress of vessels of all nations. In contradistinction to this artificial construction of a conquest of a part of the sea, some writers<sup>8</sup> try to justify blockade by the necessity of war. I think, however, that no special justification of blockade is necessary at all. The fact is that the detrimental consequences of blockade to neutrals stand in the same category as the many other detrimental consequences of war to neutrals. Neither the one nor the other need be specially justified. A blockade interferes indeed with the recognised principle of the freedom of the sea, and, further, with the recognised freedom of neutral commerce. But all three have developed together, and when the freedom of the sea in time of peace and war, and, further, the freedom

<sup>1</sup> Fauchille, § 1621, prefers to liken a canal to natural straits in this respect.

<sup>2</sup> Suez Canal Convention, 1888, Article 1. See above, vol. i. § 183.

<sup>3</sup> Hay-Pauncefote Treaty, 1901, Article 3, and Hay-Varilla Treaty, 1903, Article 18: see above, vol. i. § 184. On the question of the effect upon third States of conventions such as these, see Roxburgh, *International Conventions and Third States* (1917).

<sup>4</sup> See above, vol. i. § 183a, and the *Wimbledon*, Publications of the Permanent Court of International Justice, Series A, No. 1.

<sup>5</sup> See above, § 373a.

<sup>6</sup> The matter is thoroughly treated by Fauchille, *Blocus*, pp. 13-36; Gùldenagel, *op. cit.*, pp. 51-86; and Genet, §§ 519-522.

<sup>7</sup> See Hautefeuille, ii. pp. 190-191.

<sup>8</sup> See Gessner, p. 151; Bluntschli, § 827; Martens, ii. § 124.

of neutral commerce, became generally recognised, the exceptional restrictions of blockade became at the same time recognised as legitimate.

## II

### ESTABLISHMENT OF BLOCKADE

See the literature quoted above at the commencement of § 368.

§ 375. A declaration of blockade being 'a high<sup>1</sup> act of sovereignty,' and having far-reaching consequences upon neutral trade, it is generally recognised not to be in the discretion of a commander of a naval force to establish a blockade without the authority of his Government. Article 9 of the unratified Declaration of London recognised this by providing that 'a declaration of blockade is made by the blockading Power or by the naval authorities acting in its name.' The authority of the Government to establish a blockade may be granted to a commander of a naval force for the express purpose of a particular blockade, the Government ordering him to blockade a certain port or coast; or the Government may expressly delegate its power of declaring a blockade to a commander, for use at his discretion; or, without such authorisation, it may ratify it retroactively.<sup>2</sup>

§ 376. A blockade does not come into being *ipso facto* by the outbreak of war. Even the actual blocking of the approach to an enemy coast by belligerent men-of-war need not by itself mean that the ingress and egress of *neutral* vessels are to be prohibited, since it may be for the purpose of preventing the egress and ingress of *enemy* vessels only. Continental writers, therefore, have always considered notification to be essential for the establishment of a blockade.) British, American, and Japanese writers, however, have not held notification to be essential, although they have considered knowledge on the part of a neutral vessel of an existing blockade to be necessary to justify her condemnation for breach of blockade.<sup>3</sup>

<sup>1</sup> *The Henrick and Maria* (1799) 1 C. Rob. 148.

<sup>2</sup> *The Rolla* (1807) 6 C. Rob. 364.

And on the whole matter see Fauchille, *Blocus*, pp. 68-73.

<sup>3</sup> See below, § 384.

As to the practice of States in regard to the kind of notification, it has always been usual for the commander who establishes a blockade to send a notification of the blockade to the authorities of the blockaded ports or coast and to the foreign consuls there. It has, further, always been usual for the blockading Government to notify the fact diplomatically to all neutral maritime States. And some States, for instance France and Italy, have always ordered their blockading men-of-war to board every approaching neutral vessel and notify her of the establishment of the blockade, endorsing the notification on the ship's papers. But Great Britain, the United States of America, and Japan had not considered notification to be essential for the institution of a blockade. They have held that the simple fact that the approach was blocked, and egress and ingress of neutral vessels actually prevented, is sufficient to make the existence of a blockade known; but when no diplomatic notification had taken place, they did not seize a vessel for breach of blockade if her master had no actual notice of the existence of the blockade. British,<sup>1</sup> American,<sup>2</sup> and Japanese<sup>3</sup> practice, accordingly, has made a distinction between a so-called *de facto* blockade and a notified blockade.<sup>4</sup>

<sup>1</sup> *The Vrouw Judith* (1799) 1 C. Rob. 150.

<sup>2</sup> See U.S. Naval War Code, Articles 39-40.

<sup>3</sup> See Japanese Prize Law, Article 30.

<sup>4</sup> If the Declaration of London had been ratified, Articles 8 to 12 would have created a common practice, for the Powers came to an agreement upon the following rules:

(1) There was to be a *declaration* as well as a *notification* in order to make a blockade binding (Article 8).

(2) A *declaration* of blockade was to be made either by the blockading Power, or by the naval authorities acting in its name, and was to specify (a) the date when the blockade began; (b) the geographical limits of the coastline under blockade; and (c) the period within which neutral vessels might come out (Article 9). If the commencement of the blockade or its geographical limits were given inaccurately the declaration was not

to be valid, and a new declaration was to be necessary in order to make the blockade binding (Article 10). If no mention was made of the period within which neutral vessels might come out, they were to be allowed to pass out freely (Article 16).

(3) *Notification* of the declaration of blockade was at once to be made. Two notifications were to be necessary (Article 11): (1) by the Government of the blockading fleet to all neutral Governments, the purpose of this notification being to enable neutral Governments to inform merchantmen sailing under their flag of the establishment of a blockade; (2) by the officer commanding the blockading force to the local authorities, whose duty it was to notify the foreign consuls at the blockaded port or coastline. The purpose of this notification was to enable neutral merchantmen in the blockaded port or ports to receive knowledge of the establishment of the blockade, and

§ 377. As regards *ingress*, a blockade becomes valid the moment it is established; even vessels in ballast have no right of ingress. As regards *egress*, it has always been usual for the blockading commander to grant a certain length of time within which neutral vessels might leave the blockaded ports unhindered<sup>1</sup>; but no rule exists respecting the length of such time. Fifteen days have frequently been granted,<sup>2</sup> but in the blockades during the World War the periods granted were very short—namely, four days in the case of the blockade of German East Africa, two days in the cases of the blockade of the Cameroons and of the Bulgarian coast on the *Ægean* Sea, and three days in the case of the blockade of the coast of Asia Minor.

Length of  
Time for  
Egress of  
Neutral  
Vessels.  
✓

§ 378. Apart from the conclusion of peace, a blockade can come to an end in four different ways. End of  
Blockade.

It may, in the first place, be raised, or restricted in its limits, by the blockading Power for any reason it likes. In such a case it has always been usual to notify the end of blockade to all neutral maritime States.<sup>3</sup>

A blockade can, secondly, come to an end through an enemy force driving off the blockading squadron or fleet. In such a case the blockade ends *ipso facto* by the blockading squadron being driven away, whatever their intention as to returning may be. Should the squadron return and resume the blockade, it must be considered as a new blockade, and not simply the continuance of the former blockade, and the

to prepare to leave the port within the period specified in the declaration of blockade. If this notification had not been made, neutral vessels were to be allowed to pass freely out of the blockaded port (Article 16).

✓ (4) The rules as to declaration and notification of blockade were to apply to cases where the limits of a blockade were extended, or where a blockade was re-established after having been raised (Article 12).

But, as has been already explained, the Declaration of London remains unratified; and though the Allied Governments adopted the greater part of it at the outbreak of the World War, later they fell back upon 'the historic and admitted

rules of the Law of Nations': see above, §§ 292, 368.

<sup>1</sup> Recognised by implication in Article 9 of the unratified Declaration of London.

<sup>2</sup> According to U.S. Naval War Code, Article 43, thirty days were to be allowed 'unless otherwise specially ordered.'

<sup>3</sup> Article 13 of the unratified Declaration of London stipulated that the voluntary raising of a blockade, as also any restrictions in its limits, must, in the same way as the declaration of a blockade, be notified to all neutral Governments by the blockading Power, and to the local authorities by the officer commanding the blockading fleet.

steps necessary for the establishment of a blockade must again be taken.<sup>1</sup>

The third ground for the ending of a blockade is its failure to be effective.<sup>2</sup>

The fourth ground is the capture and occupation of the blockaded port or coast by the blockading force. It was indeed held in the American Civil War, in the case of the *Circassian*,<sup>3</sup> that this did not end the blockade; but the Mixed Commission on British and American Claims, set up after the war, considered that judgment to be wrong, and awarded compensation to all the claimants.<sup>4</sup>

### III

#### EFFECTIVENESS OF BLOCKADE

See the literature quoted above at the commencement of § 368.

Effective  
in contra-  
distinction  
to  
Fictitious  
Blockade.

§ 379. The necessity that a blockade should be made effective by the presence of a blockading squadron of sufficient strength to prevent egress and ingress of vessels became gradually recognised during the first half of the nineteenth century; it became formally enacted as a principle of the Law of Nations through the Declaration of Paris<sup>5</sup> in 1856, and was recognised in Article 2 of the unratified Declaration of London. Effective blockade is the contrast to so-called fictitious or paper blockade, which was frequently practised during the seventeenth, the eighteenth, and at the beginning of the nineteenth century.<sup>6</sup> Fictitious blockade consists in declaring and notifying that a port or a coast is blockaded, without, however, posting a sufficient number of men-of-war on the spot to be really able to prevent egress and ingress of every vessel. It was one of the

<sup>1</sup> See Article 12 of the unratified Declaration of London.

<sup>2</sup> See below, § 382.

<sup>3</sup> (1864) 2 Wall. 135.

<sup>4</sup> However, in 1899 during the Spanish-American War, the Supreme Court of the United States in *The Adula* (176 U.S. 361) held the case of the *Circassian* to be decisive; see Hyde, ii. § 842, and note in Scott,

*Cases*, 815. Some doubt appears to have existed as to the effectiveness of the occupation of the port to which the *Circassian* was bound.

<sup>5</sup> 'Les blocus, pour être obligatoires, doivent être effectifs, c'est à dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi.'

<sup>6</sup> See Fauchille, *Blocus*, pp. 74-109.

principles of the First and of the Second Armed Neutralities that a blockade should always be effective; but it was not till after the Napoleonic wars that this principle gradually found universal recognition. During the second half of the nineteenth century, even those States which had not acceded to the Declaration of Paris did not dispute the necessity of a blockade being effective.

§ 380. The condition of effectiveness of a blockade, as defined by the Declaration of Paris, is its maintenance *by such a force as is sufficient really to prevent access to the coast* Condition of Effectiveness of Blockade. But no unanimity exists respecting what is required to constitute an effective blockade according to this definition. Apart from differences of opinion regarding points of minor interest, it may be stated that in the main there have been two conflicting opinions.

According to one opinion, the definition of an effective blockade pronounced by the First Armed Neutrality of 1780 is valid, and a blockade is effective only when the approach to the coast is barred by a chain of men-of-war, anchored on the spot, and so near to one another that the line cannot be passed without obvious danger to the passing vessel.<sup>1</sup> This corresponds to the practice followed before the World War by France.

According to another opinion, a blockade is effective when the approach is watched—to use the words of Dr. Lushington<sup>2</sup>—‘by a force sufficient to render the egress and ingress dangerous, or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable.’ According to this opinion, there need be no chain of anchored men-of-war to expose to a cross fire any vessels attempting to break

<sup>1</sup> See Hautefeuille, ii. p. 194; Gessner, p. 169; Kleen, i. § 129; Boeck, Nos. 676-681; Dupuis, Nos. 173-174; Fauchille, *Blocus*, pp. 110-142; Genet, §§ 524-528, 541-546. Phillimore, iii. § 293, takes up the same standpoint in so far as a blockade *de facto* is concerned: ‘A blockade *de facto* should be effected by stationing a number of ships, and

forming as it were an arch of circumvallation round the mouth of the prohibited port, where, if the arch fails in any one part, the blockade itself fails altogether.’

<sup>2</sup> In his judgment in *The Franciska* (1855) Spinks 287. For a survey of other cases and awards see *Harvard Research* (1939), pp. 710, 711.



the blockade ; a real danger of capture suffices, whether the danger is caused by cruising or anchored men-of-war. This is the standpoint of the theory and practice of Great Britain and the United States, and it seems likewise to be that of Germany and several German writers.<sup>1</sup>

The Declaration of London, if it had been ratified, would have settled the controversy at least to the extent of determining that 'the question whether a blockade is effective, is a question of fact,'<sup>2</sup> and thereby recognising by implication, the before-mentioned decision of Dr. Lushington. But, as has been explained,<sup>3</sup> the Declaration remains unratified, and it was abandoned by Great Britain and France during the World War.

Instru-  
ments of  
Blockade.

§ 380a. It has been shown<sup>4</sup> that the normal instrument of blockade is a squadron of men-of-war, and that, provided that the condition of effectiveness can be attained thereby, even one man-of-war stationed in a narrow channel may be enough. The basis of a lawful blockade must always be one or more men-of-war, but their operations may be supplemented by other agencies. Thus, in certain cases, and in the absence of a sufficient number of men-of-war, a blockade may be made effective by planting land batteries within range of any vessel attempting to pass, provided that there be at least one man-of-war engaged in the blockade.<sup>5</sup> And it has been held that a blockade does not cease to be effective because it is supplemented by men-of-war belonging to an ally which has not participated in the declaration of the blockade.<sup>6</sup>

It is a moot point<sup>7</sup> whether submarine vessels, particularly when operating as submarine vessels and not as surface craft, can without the co-operation of surface craft con-

<sup>1</sup> See Perels, § 49; Bluntschli, § 829; Liszt, § 64 A.

<sup>2</sup> Article 3.

<sup>3</sup> Above, §§ 292, 368.

<sup>4</sup> See above, § 368.

<sup>5</sup> *The Nancy* (1809) 1 Acton 63; *The Circassian* (1864) 2 Wall. 135; *The Olinde Rodrigues* (1898) 174 U.S. 510. See also Bluntschli, § 829;

Perels, § 49; Geffcken in *Holtzendorff*, iv. p. 750; Walker, *Manual*, § 78.

<sup>6</sup> *The Aghios Spiridon* and other cases in Fauchille, *Jur. ital.*, 4.

<sup>7</sup> See Winfield in Lawrence, § 249; see also Laurens, *op. cit.* (above, § 368), pp. 22-66, 131-209. See also Laurens, *Le blocus et la guerre sous-marine* (1924); Renault, *Le sous-marin et sa situation dans le droit des gens* (1932), pp. 93-124.

stitute a lawful blockade; for the limitations inherent in them make it difficult for them to follow the usual practices of surface craft in enforcing a blockade.

A very unsatisfactory article (2) of Hague Convention VIII., which has already been discussed,<sup>1</sup> prohibits the laying of 'automatic contact mines off the coasts and ports of the enemy with the sole object of intercepting commercial shipping.'<sup>2</sup>

§ 380b. As blockade has been, historically, a purely naval institution it has been maintained that there cannot be an aerial blockade pure and simple.<sup>3</sup> This is certainly true if we have in mind a blockade regulated by the rules and safeguards hitherto applying to this aspect of naval warfare. Such part as aircraft may legitimately play in relation to blockade is either, actively, as an auxiliary arm of naval blockade or, passively, when aircraft is denied ingress or egress in connection with an established naval blockade. In the latter case, in so far as the blockade is directed against aircraft, the rules governing such questions as effectiveness of blockade, notification,<sup>4</sup> and consequences of breach of blockade will in practice correspond to those applicable to vessels. But it seems clear that in the future aircraft will primarily form an important subsidiary arm of the blockading naval forces directed against vessels. In that case, so long as such auxiliary aircraft can be used subject to the established rules of blockade, it constitutes a substantial element in ascertaining the effectiveness of the blockade. On the other hand, the effectiveness of a naval blockade, maintained with or without the assistance of aircraft, is not affected by the failure to prevent the passage of enemy or neutral aircraft.<sup>5</sup>

<sup>1</sup> See above, § 182a.

<sup>2</sup> As to a 'stone blockade' see above, § 368.

<sup>3</sup> See Spaight, *Air*, p. 396; Moore, *International Law and Some Current Illusions* (1924), pp. 206, 207. And see *Harvard Research* (1939), pp. 709-714, and Høijer in *Acta Scandinavica* (1938), pp. 107-115. See also Smith in *B.Y.*, xvii. (1936) pp. 37-44.

<sup>4</sup> See as to these Spaight, *Air*, pp. 337-399.

<sup>5</sup> It was pointed out in the comment on Article 53 of the Hague Rules, which provided for the capture of aircraft engaged in breaking the blockade, that 'the invention of aircraft cannot impose upon a belligerent who imposes a blockade the obligation to employ aircraft in co-operation with its naval forces': Misc. No. 14 (1924), Cmd. 2201, pp. 50, 51.

Amount  
of Danger  
which  
creates  
Effective-  
ness.

§ 381. It is impossible to state exactly what degree of danger to a vessel attempting to pass is necessary to prove an effective blockade. It is recognised that a blockade does not cease to be effective because now and then a vessel succeeds in passing the line unhindered, provided that there was so much danger as to make her capture probable.<sup>1</sup>

Cessation  
of Effec-  
tiveness.

§ 382. A blockade is effective so long as the danger lasts which makes probable the capture of such vessels as attempt to pass the approach. It ceases *ipso facto* by the absence of such danger, whether the blockading men-of-war are driven away, or are sent away for the fulfilment of some task which has nothing to do with the blockade, or voluntarily withdraw, or allow the passage of vessels in other cases than those which are exceptionally admissible.

On the other hand, practice,<sup>2</sup> and the majority of writers, have always recognised that a blockade does not cease to be effective because the blockading force is driven away for a short time through stress of weather, and Article 4 of the unratified Declaration of London adopted this view by providing that 'a blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather.' British<sup>3</sup> writers have also denied that a blockade ceases to be effective because a blockading man-of-war is absent for a short time for the purpose of chasing a vessel which succeeded in passing the approach unhindered,<sup>4</sup> but the unratified Declaration of London did not recognise this.<sup>5</sup>

#### IV

#### BREACH OF BLOCKADE

See the literature quoted above at the commencement of § 368.

Defini-  
tion of  
Breach of  
Blockade.

§ 383. Breach or violation of blockade is the unallowed ingress or egress of a vessel in spite of the blockade. An

<sup>1</sup> See *The Franciska* (1885) Spinks 287, which was reversed by the Privy Council, but not on this point (10 Moore P.C. 37).

<sup>2</sup> See Twiss, ii. § 103, p. 201, and Phillimore, iii. § 294.

<sup>4</sup> See Article 37 of U.S. Naval War Code.

<sup>5</sup> See the Report of the Drafting Committee on Article 4.

<sup>2</sup> *The Columbia* (1799) 1 C. Rob. 154.

attempted breach is, so far as a punishment is concerned, treated in the same way as a consummated breach; but the practice of States has differed as to the time at which, and the act by which, an attempt to break a blockade commences.

§ 384. Since breach of blockade is, from the standpoint of the blockading belligerent, a criminal act, knowledge on the part of a vessel of the existence of a blockade is essential for making her egress or ingress a breach of blockade. No Breach without Notice of Blockade.

It is for this reason that Continental theory and practice have never considered a blockade established without local and diplomatic notification, so that every vessel might have, or might be supposed to have, notice of its existence. For the same reason some States, for instance France and Italy, have never considered a vessel to have committed a breach of blockade unless, before her attempted ingress, one of the blockading cruisers stopped her, gave her special warning, and recorded the warning in her log-book.<sup>1</sup>

British, American, and Japanese practice regarding the necessary knowledge of the existence of a blockade on the part of a vessel has always made a distinction between actual and constructive notice, no breach of blockade having been held to exist without either the one or the other.<sup>2</sup> Actual notice has been understood to mean knowledge acquired by a direct warning from one of the blockading men-of-war, or knowledge acquired from any other public or private source of information. Constructive knowledge has been understood to arise when a vessel has been presumed to know of the blockade on the ground either of notoriety or of diplomatic notification. The existence of a blockade has always been presumed to be known to vessels within the blockaded ports; but it has been a question of fact whether it was known to other vessels. Knowledge of the existence of a blockade has always been presumed if sufficient time had elapsed after the home State of the vessel had received diplomatic notification of the blockade for it to inform all

<sup>1</sup> See above, § 376.

<sup>2</sup> See Holland, *Prize Law*, §§ 107, 114-127; U.S. Naval War Code, Article 39; Japanese Prize Law,

Article 26. As to the probable application of this practice to aircraft see Spaight, *Air*, pp. 398-399.

vessels sailing under its flag, whether or no they had actually received, or taken notice of, the information.<sup>1</sup>

The  
Former  
Practice  
as to  
what con-  
stitutes an  
Attempt  
to break  
Blockade.

§ 385. The practice of States, as well as the opinions of writers, have differed much as to what acts of a vessel constitute an attempt to break blockade.

(1) The Second Armed Neutrality of 1800 sought to restrict an attempt to break blockade to the employment of force or ruse by a vessel on the line of blockade for the purpose of passing through. This was, on the whole, the practice of France, which moreover, as stated before, required that the vessel should before the attempt have received special warning from one of the blockading men-of-war. Many writers<sup>2</sup> took the same standpoint.

(2) The practice of other States, for instance Japan, approved by many writers,<sup>3</sup> went beyond this, and considered that an attempt to break blockade had been made when a vessel, with or without force or ruse, endeavoured to pass the line of blockade; when, for instance, a vessel

<sup>1</sup> *The Vrow Judith* (1799) 1 C. Rob. 150; *The Neptunus* (1799) 2 C. Rob. 110; *The Calypso* (1799) 2 C. Rob. 298; *The Neptunus* (1800) 3 C. Rob. 173; *The Hoffnung* (1805) 6 C. Rob. 112.

The unratified Declaration of London followed, to a certain extent, British, American, and Japanese practice; it differed chiefly in that the presumption of knowledge of a blockade was never to be absolute, but might in every case be rebutted. Article 14 provided that 'the liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.' Knowledge of the blockade was to be presumed, *failing proof to the contrary*, in case the vessel had left a neutral port subsequent to the notification of the blockade to the Power to which such port belonged, and provided that the notification was made in sufficient time (Article 15). But in case a neutral vessel *approaching* a blockaded port had neither actual nor presumptive knowledge of the blockade, she was not to be considered *in delicto*, and notification

had to be made to her by recording a warning in her log-book. Further, if a neutral vessel was *coming out* of a blockaded port, she had to be allowed to pass free, in case, through the negligence of the officer commanding the blockading fleet, no declaration of blockade had been notified to the local authorities, or in case, in the declaration as notified, no period had been mentioned within which neutral vessels might come out (Article 16). However this may be, the Declaration remains unratified, and modifications were made with regard to presumed knowledge of the existence of a blockade when its rules were put into force by the Allied Powers at the outbreak of the World War.

<sup>2</sup> See Hautefeuille, ii. p. 234; Kleen, i. § 137; Gessner, p. 202; Dupuis, No. 185; Fauchille, *Blocus*, p. 322.

<sup>3</sup> See Bluntschli, § 835; Perels, § 51; Geffcken in *Holtzendorff*, iv. p. 763; Rivier, ii. p. 431. See also § 25 of the Prussian Regulations (1864) concerning Naval Prizes, and Article 29 of the Japanese Naval Prize Law.

destined for a blockaded place was found anchoring or cruising near the line of blockade.

(3) The practice of Great Britain and the United States of America went furthest, since it considered that an attempt to break blockade had been made when a vessel, not destined according to her ship's papers for a blockaded port, was found near it and steering for it; or when a vessel, destined for a port the blockade of which was diplomatically notified, started on her journey knowing that the blockade had not been raised (except when the port from which the vessel sailed was so far distant from the scene of war as to justify her master in starting for a destination known to be blockaded on the chance of finding that the blockade had been removed, and with an intention of changing her destination should that not prove to be the case).<sup>1</sup> This practice, further, applied the doctrine of continuous voyages<sup>2</sup> to blockade, for it considered that an attempt to break blockade was committed by a vessel which, although ostensibly destined for a neutral or an unblockaded port, in reality intended, after touching there, to go on to a blockaded port.<sup>3</sup>

(4) During the Civil War, the American Prize Courts carried the practice further by condemning vessels for breach of blockade which knowingly carried to a neutral port cargo ultimately destined for a blockaded port, and by condemning for breach of blockade such cargo<sup>4</sup> as was ultimately destined for a blockaded port, when the carrying vessel was ignorant of its ulterior destination. Thus the *Bermuda*,<sup>5</sup> a British vessel with a cargo part of which was, in the opinion of the American courts, ultimately destined for the blockaded ports of the Confederate States, was seized on her voyage to the neutral British port of Nassau, in the Bahama Islands, and condemned for breach of blockade by the American courts. The same happened to the British vessel *Stephen Hart*,<sup>6</sup> which was seized on her voyage to

<sup>1</sup> See Holland, *Prize Law*, § 133, and U.S. Naval War Code, Article 42; *The Betsey* (1799) 1 C. Rob. 322.

<sup>2</sup> On this doctrine see below, § 400 (n.).

<sup>3</sup> See Holland, *Prize Law*, § 134,

and *The James Cook* (1810) Edwards 261.

<sup>4</sup> But not the vessel.

<sup>5</sup> (1865) 3 Wall. 514.

<sup>6</sup> (1865) 3 Wall. 559; Scott, *Cases*,

988.

the neutral port of Cardenas, in Cuba. And in the famous case of the *Springbok*,<sup>1</sup> a British vessel also destined for Nassau, in the Bahama Islands, which was seized on her voyage to this neutral British port, the cargo alone was finally condemned for breach of blockade, since, in the opinion of the court, the vessel was not cognisant that the cargo was intended to reach a blockaded port. The same happened to the cargo of the British vessel *Peterhoff*,<sup>2</sup> destined for the neutral port of Matamoros, in Mexico. The British Government declined to intervene in favour of the British owners of the respective vessels and cargoes.<sup>3</sup>

It is true that the majority of authorities<sup>4</sup> assert the illegality of these judgments of the American Prize Courts, but it is a fact that Great Britain at the time recognised as correct the principles which are the basis of these judgments.<sup>5</sup>

<sup>1</sup> (1866) 5 Wall. 1.

<sup>2</sup> (1866) 5 Wall. 28; Scott, *Cases*, 980.

<sup>3</sup> See Parl. Papers, Misc. No. 1 (1900).

<sup>4</sup> See, for instance, Holland, *Prize Law*, p. 38, n. 2; Phillimore, iii. § 298; Twiss, *Belligerent Right on the High Seas* (1884), p. 19; Hall, § 263; Gessner, *Kriegführende und neutrale Mächte* (1877), pp. 95-100; Bluntschli, § 835; Perels, § 51; Fauchille, *Blocus*, pp. 333-344; Martens, ii. § 124. See also Wharton, iii. § 362, p. 401, and Moore, vii. § 1276. See also Baty in *Grotius Society*, xi. (1926) pp. 21-28.

<sup>5</sup> The unratified Declaration of London sought to effect a settlement of this controversial matter.

Article 17 provided that 'neutral vessels may not be captured for breach of blockade except within the area of operations of the men-of-war detailed to render the blockade effective'; and Article 19 provided that 'whatever may be the ulterior destination of a vessel or of her cargo, she may not be captured for breach of blockade, if, at the moment, she is on the way to a non-blockaded port.'

According to these provisions, a neutral vessel, to be guilty of an attempt to break blockade, must actually have entered the area of operations (*rayon d'action*) of the blockading fleet. This area of opera-

tions was to be a question of fact in each case (Report of the Drafting Committee on Article 17).

But the mere fact that a neutral vessel had entered the area of operations was not to be sufficient to justify her capture; she had also to be destined for, and be on her way to, the blockaded port. If she passed through the area of operations without being destined for, and on her way to, the blockaded port, she was not attempting to break the blockade. Even should the ulterior destination of a vessel or her cargo be the blockaded port, she was not to be regarded as attempting to break the blockade, if, at the moment of visit, she was really on her way to a non-blockaded port (Article 19). However, she had to be really, and not only apparently, on her way to a non-blockaded port; if it could be proved that in reality her immediate destination was the blockaded port and that she only feigned to be destined for a non-blockaded port, she might be captured, for she was actually attempting to break the blockade (see the Report of the Drafting Committee on Article 19).

However that may be, these provisions excluded the application to blockade of the doctrine of continuous voyage in any form. But at the outbreak of the World War the

§ 386. Although blockade inwards interdicts ingress to all vessels, if not especially licensed,<sup>1</sup> necessity makes exceptions to the rule.<sup>2</sup>

When  
Ingress is  
not con-  
sidered  
Breach of  
Blockade.

According to the practice which before the World War had been quite general, whenever a vessel, either by need of repairs,<sup>3</sup> stress of weather,<sup>4</sup> want of water<sup>5</sup> or provisions, or upon any other ground, was absolutely obliged to enter a blockaded port, such ingress did not constitute a breach of blockade. On the other hand, according to British practice at any rate, ingress did not cease to be breach of blockade if caused by intoxication of the master,<sup>6</sup> ignorance<sup>7</sup> of the coast, loss of compass,<sup>8</sup> endeavour to get a pilot,<sup>9</sup> and the like, or an attempt to ascertain<sup>10</sup> whether the blockade was raised.<sup>11</sup>

§ 387. There are a few cases of egress which, according to

When  
Egress is  
not con-  
sidered  
Breach of  
Blockade.

Declaration had not been ratified, and though at first the Allied Governments adopted most of its rules, including Article 19, in March 1916 (*London Gazette*, March 31, 1916), they abandoned that article, and declared that the principle of continuous voyage or ultimate destination should apply to blockade. Later, as has already been explained, they abandoned the Declaration altogether (see above, §§ 292, 368).

Article 80 of the French Instructions of 1934 provides expressly that 'no vessel shall be exempt from capture for a breach of blockade for the sole reason that, at the time of the visit, she was on her way to a non-blockaded port.'

136; and *The James Cook* (1810) Edwards 261.

The unratified Declaration of London recognised that necessity makes exceptions to the rule that vessels may not enter a blockaded port. Article 7 provided that 'in circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade, and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.' However, this article did not define *circumstances of distress*, and made it a condition that those circumstances must be acknowledged by an officer of the blockading force. (See the case of the *Clumberhall*, a British vessel condemned by the Italian Prize Court for having entered a blockaded area during the Turco-Italian War, in 1912, under a plea of distress, without first having had the cause of distress verified by the blockading fleet. The facts were stated in the House of Commons on May 25, 1914; see *Hansard*, 63, p. 108.) Everything was therefore, *prima facie* at any rate, left to the consideration of that officer. But once he had acknowledged that the vessel was in distress, he was in duty bound (see Report of the Drafting Committee on Article 7) to allow her to enter the blockaded port, unless he relieved the distress himself.

<sup>1</sup> See above, § 370.

<sup>2</sup> As to the application of similar exceptions to aircraft see Spaight, *Air*, pp. 398-399.

<sup>3</sup> *The Charlotta* (1810) Edwards 252.

<sup>4</sup> *The Fortuna* (1803) 5 C. Rob. 27.

<sup>5</sup> *The Hurtig Hane* (1799) 2 C. Rob. 124.

<sup>6</sup> *The Shepherdess* (1804) 5 C. Rob. 262.

<sup>7</sup> *The Adonis* (1804) 5 C. Rob. 256.

<sup>8</sup> *The Elizabeth* (1810) Edwards 198.

<sup>9</sup> *The Neutralitet* (1805) 6 C. Rob. 30.

<sup>10</sup> *The Spes and Irene* (1804) 5 C. Rob. 76.

<sup>11</sup> See Holland, *Prize Law*, §§ 135-



the practice of Great Britain and most other States before the World War, were not considered breaches of blockade outwards.<sup>1</sup> Thus a vessel which was in a blockaded port before the commencement of the blockade<sup>2</sup> was allowed to sail from it in ballast, as was also a vessel that had entered during a blockade, either in ignorance of it, or with the permission of the blockading squadron.<sup>3</sup> Thus, further, a vessel, the cargo of which was put on board before the commencement of the blockade, was allowed to leave the port afterwards unhindered.<sup>4</sup> Thus, again, a vessel obliged by absolute necessity to enter a blockaded port was afterwards allowed to leave it unhindered. And a vessel employed by the diplomatic envoy of a neutral State for the exclusive purpose of sending home from a blockaded port distressed seamen of his nationality<sup>5</sup> was also allowed to pass unhindered.<sup>6</sup>

Passage  
through  
Unblock-  
aded  
Canal no  
Breach of  
Blockade.

§ 388. A breach of blockade can only be committed by passing through the blockaded approach. Therefore, if the maritime approach to a port is blockaded, but an inland canal leads from it to another unblockaded port or to a neutral port, no breach of blockade is committed by the egress or the ingress of a vessel passing such canal for the purpose of reaching the blockaded port.<sup>7</sup>

## V

### CONSEQUENCES OF BREACH OF BLOCKADE

See the literature quoted above at the commencement of § 368.

Capture  
of  
Blockade-  
running  
Vessels.

§ 389. It is universally recognised that a vessel may only be captured for a breach of blockade while *in delicto*; that

<sup>1</sup> See Holland, *Prize Law*, § 130; Twiss, ii. § 113; Phillimore, iii. § 313.

<sup>2</sup> *The Frederick Molike* (1798) 1 C. Rob. 86.

<sup>3</sup> *The Juno* (1799) 2 C. Rob. 116.

<sup>4</sup> *The Vrouw Judith* (1799) 1 C. Rob. 150.

<sup>5</sup> *The Rose in Bloom* (1811) 1 Dod. 55.

<sup>6</sup> The unratified Declaration of London recognised by Article 7—see above, § 386 (n.)—that a vessel which, on account of distress, entered a blockaded port must be allowed to

leave it afterwards, provided she had neither discharged nor shipped cargo there; and Article 16—see above, § 384 (n.)—provided that a vessel coming out of a blockaded port in the circumstances there mentioned must be allowed to pass free. But beyond these the Declaration did not specify any cases in which egress was not to be considered breach of blockade.

<sup>7</sup> *The Stert* (1801) 4 C. Rob. 65; *The Ocean* (1801) 3 C. Rob. 297. See Phillimore, iii. § 314.

means during an attempt to break the blockade, or during the breach itself. But here again practice as well as theory have differed much, since there has been no unanimity with regard to the extent of time during which an attempted breach or an actual breach could be said to be continuing.

It has already been stated <sup>1</sup> that it has been a moot point from what moment a breach of blockade can be said to have been attempted, and that, according to the practice of Great Britain and the United States, the fact that a vessel destined for a blockaded port was starting on her voyage constituted an attempt. It is obvious that this controversy bears upon the question from what point of time a blockade-running vessel must be considered *in delicto*.

But it has been likewise a moot point when the period of time during which a blockade-running vessel might be said to be *in delicto* comes to an end. According to Continental theory and practice, the vessel has been considered to be *in delicto* only so long as she is actually on the line of blockade, or, having fled from there, so long as she is being pursued by one of the blockading cruisers. On the other hand, according to the practice of Great Britain <sup>2</sup> and the United States,<sup>3</sup> a blockade-running vessel has been held to be *in delicto* so long as she *has not completed her voyage from the blockaded port to the port of her destination and back to the port from which she started originally*, the voyage out and home being considered one voyage. But a vessel has been held to be *in delicto* only so long as the blockade continued, capture being no longer admissible in case the blockade had been raised or had otherwise come to an end.<sup>4</sup>

<sup>1</sup> Above, § 385.

<sup>2</sup> *The Welvaart van Pillaw* (1799) 2 C. Rob. 128; *The General Hamilton* (1805) 6 C. Rob. 61.

<sup>3</sup> See U.S. Naval War Code, Article 44.

<sup>4</sup> The Declaration of London sought to settle the controversy, for, according to Article 20, a vessel was to be *in delicto* so long only (see below, § 428a) as she was being pursued by a man-of-war of the blockading force (and not by any other cruiser), and she might no longer be captured if the pursuit was abandoned

or if the blockade was raised. Under this rule, a blockade-breaking vessel was liable to capture so long as the pursuit lasted, whether or no she was still within the area of operations; even if for a while she had taken refuge in a neutral port, she might, on coming out, be captured, provided that the captor was one of the men-of-war of the blockading force which had pursued her and waited for her outside the port of refuge (see the Report of the Drafting Committee on Article 20). However, the Declaration has not been ratified.

Penalty  
for Breach  
of  
Blockade.

§ 390. Capture being effected, the blockade-runner must be sent to a port, to be brought before a Prize Court. For this purpose the crew may be temporarily detained, as they will have to serve as witnesses. In former times the crew could be imprisoned, and it is said that even capital<sup>1</sup> punishment could have been pronounced against them. But since the eighteenth century this practice of imprisoning the crew has been abandoned, and nowadays the crew may not even be made prisoners of war, but must be released as soon as the Prize Court has pronounced its decision.<sup>2</sup> The only penalty which may be pronounced is confiscation of the vessel and the cargo. But the practice<sup>3</sup> of the several States has differed much concerning the penalty for breach of blockade. According to British and American practice before the World War, confiscation of both vessel and cargo might take place in case the owners of the vessel were identical with those of the cargo. In case vessel and cargo had not the same owners, confiscation of both took place only when the cargo consisted of contraband of war or the owners knew of the blockade at the time the cargo was shipped for the blockaded port.<sup>4</sup> It mattered not whether the captured vessel which carried the cargo had herself actually passed through the blockaded line, or whether the breach of blockade was effected through the combined action of lighters and the vessel, the lighters passing the line and discharging the cargo into the vessel near the line, or *vice versa*.<sup>5</sup> The cargo alone was confiscated, according to the judgments of the American Prize Courts during the Civil War in the case of the *Springbok* and in similar cases,<sup>6</sup> when goods ultimately destined for a blockaded port were sent to a neutral port on a vessel whose owners were ignorant of this ulterior destination of the goods.<sup>7</sup>

<sup>1</sup> See Bynkershoek, *Quaestiones Juris publici*, i. c. 11.

<sup>2</sup> See *Calvo*, v. §§ 2897-2898; U.S. Naval War Code, Article 45.

<sup>3</sup> See Fauchille, *Blocus*, pp. 357-394; Gessner, pp. 210-214; Perels, § 51, pp. 276-278.

<sup>4</sup> *The Mercurius* (1798) 1 C. Rob. 80; *The Columbia* (1799) 1 C. Rob. 154; *The Alexander* (1801) 4 C. Rob.

93; *The Adonis* (1804) 5 C. Rob. 256; *The Exchange* (1808) Edwards 39; *The Panaghia Rhomba* (1858) 12 Moore P.C. 168. See Phillimore, iii. §§ 318-319.

<sup>5</sup> *The Maria* (1805) 6 C. Rob. 201.

<sup>6</sup> See above, § 385 (4).

<sup>7</sup> The Declaration of London proposed to settle the matter by a very simple rule, for according to Article

## VI

### THE SO-CALLED LONG-DISTANCE BLOCKADE

Higgins in Hall, § 266a—Winfield in Lawrence, § 252—Bellot in Pitt Cobbett, *Leading Cases*, ii. 554—Hyde, ii. §§ 829-832—Garner, ii. §§ 526-531, *Developments*, pp. 375-382, and in *A.J.*, xxv. (1931) pp. 35-49—Navello, *L'évolution du droit de visite et du droit de prise au cours de la dernière guerre* (1925), pp. 193-213—Fenwick, pp. 551-553—Keith's Wheaton, pp. 1022-1028—Fauchille, §§ 1656 (21)-1656 (26)—Liszt, § 64 A—Kunz, pp. 258-263—Genet, §§ 552-561—Verzijl, *The Law of Prize with regard to Neutrals in the World War* (1917) (in Dutch), pp. 39-313—Parmelee, *Blockade and Sea Power* (1924)—Briggs, *The Doctrine of Continuous Voyage* (1926)—Spaight, *Commerce*—Borchard in *A.S. Proceedings*, 1923, pp. 61-70—Graham, *The Controversy between the United States and the Allied Governments respecting Neutral Rights and Commerce during the Period of American Neutrality* (1914-1917), University of Texas Bulletin, pp. 1-192—Jessup, *American Neutrality and International Police* (1928), pp. 32-64—Guichard, *The Naval Blockade, 1914-1918* (translation from the French, 1930)—Lord Eustace Percy, *Maritime Trade in War* (1930), pp. 33-65—Martini, *Blockade im Weltkrieg* (1932)—the same, *Reformvorschlge zum Seekriegsrecht* (1933), and in *Nordisk, T.A.*, v. (1934) pp. 67-74—Turlington, *Neutrality*, vol. iii., *The World War Period* (1936)—Malkin in *B.Y.*, 1922-1923, pp. 87-98—Trimble in *A.J.*, xxiv. (1930) pp. 79-99—Baty in *A.J.*, xxv. (1931) pp. 625-641.

§ 390a. In the foregoing sections of this chapter the conception of blockade as understood before the World War, and the rules of International Law concerning it, have been explained and discussed. The World War did not illustrate or develop these rules, because the few blockades that were declared—blockades of the coast of German East Africa, of the Cameroons, of Bulgaria on the gean Sea, of Asia Minor, and a few others<sup>1</sup>—provoked little or no controversy, and played no part in the major operations of the war. The Central Powers, whose surface warships were only able to leave their base for an occasional raid, were certainly in no position to maintain an effective blockade in accordance with the rules set forth in this chapter; while the

The Long-Distance Blockade in 1916-1918.

21 the penalty for blockade-breaking was to be condemnation of the vessel in all cases, and condemnation of the cargo also, unless it was proved that at the time of the shipment of the goods the shipper *neither knew, nor could have known*, of the intention of the vessel to break the blockade. The case in which the whole, or part, of

the cargo consisted of contraband was not mentioned by Article 21, but its condemnation is a matter of course. However, the Declaration has not secured ratification.

<sup>1</sup> Details in Garner, ii. § 510. See also de la Chaise, *Les blocus rgulirs pendant la grande guerre* (1938).

Allied and Associated Powers, confronted by mines and submarines along a coastline highly organised for defence, found it impracticable to establish a blockade of Germany of a type known in former wars. Instead, they resorted to what is called a *long-distance blockade*.<sup>1</sup>

It has already been said<sup>2</sup> that when, in February 1915, Germany declared the waters round the British Isles to be a war zone, and proclaimed that all enemy ships found in that area would be destroyed, and neutral ships might be exposed to danger, Great Britain announced that, in concert with her allies, she would endeavour, as a measure of retaliation, to prevent commodities of any kind from reaching or leaving Germany. The Order in Council of March 11, 1915, which gave effect to this decision was expressly stated to be retaliatory, and did not speak of establishing a blockade, with the recognised rules for which it did not conform. But only a few days later the British Foreign Secretary announced the new policy to the United States ambassador in the words: 'The British Fleet has instituted a blockade, effectively controlling by cruiser "cordon" all passage to and from Germany by sea.'<sup>3</sup>

This long-distance blockade was promptly challenged by neutrals, and in particular by the United States of America.<sup>4</sup> She admitted that, as great changes had occurred in the conditions and means of naval warfare since the rules hitherto governing legal blockade were formulated, a 'close' blockade with its cordon of ships in the immediate offing of the blockaded ports might be no longer practicable; but she complained that the British measures did not even conform with 'the spirit and principles of the essence of the rules of war.'<sup>5</sup>

<sup>1</sup> See Garner, ii. §§ 509-531, and in *A.J.*, ix. (1915) pp. 843-857; Perrinjaquet in *R.G.*, xxiv. (1915) pp. 210-255; Piggott, *The Neutral Merchant* (1915).

<sup>2</sup> See above, § 319.

<sup>3</sup> *Parl. Papers*, Misc. No. 6 (1915), Cmd. 7816, p. 26; for the corresponding French decree see Verzijl, § 322.

<sup>4</sup> In Notes dated April 2, 1915, and November 5, 1915; *Parl. Papers*,

Misc. No. 14 (1916), Cmd. 8233, p. 1, No. 15 (1916), Cmd. 8234, p. 2.

<sup>5</sup> Her main grounds of criticism were (1) that these measures amounted to a blockade of neutral ports—'so great an area of the high seas is covered, and the cordon of ships is so distant from the territory affected, that neutral vessels must necessarily pass through the blockading force in order to reach important neutral

§ 390b. Whatever may have been the merits of the protracted controversy,<sup>1</sup> Great Britain and her allies applied themselves to the difficult task of discriminating between *bona fide* neutral commerce and that intended for Germany.

The Isolation of the Central Empires during the World War.

ports which Great Britain, as a belligerent, has not the legal right to blockade' (Note of April 2, 1915. See also Note of November 5, 1915, No. 21); (2) that, as trade between Scandinavian ports and German Baltic ports was not intercepted, these measures did not 'bear with equal severity' upon all neutrals (Note of April 2, 1915. See also Note of November 5, 1915, No. 20); and (3) that they were not effective, since 'German coasts are open to trade with the Scandinavian countries' and 'German naval vessels cruise both in the North Sea and the Baltic and seize and bring into German ports neutral vessels bound for Scandinavian and Danish ports' (Note of November 5, 1915, No. 19). The United States argued that 'measured by the three universally conceded tests above set forth' the British long-distance blockade could not be regarded as constituting 'a blockade in law, in practice, or in effect' (Note of November 5, 1915, No. 22).

To these arguments the British Government replied (in Notes dated July 23, 1915, and April 24, 1916: 'Parl. Papers, *ibid.*) that these measures amounted to 'no more than an adaptation of the old principles of blockade to the peculiar circumstances' (Note of July 23, 1915, No. 2) of the World War, and that, although they ought not to be judged with strict reference to the rules applicable to blockade (Note of April 24, 1916, No. 35), they were in harmony with the spirit of those rules (Note of April 24, 1916, No. 33). To the American complaint (1) that they constituted a blockade of neutral ports, Great Britain replied that 'if the blockade can only become effective by extending it to enemy commerce passing through neutral ports, such an extension is defensible and in accordance with principles which have met with general acceptance' (Note of July 23, 1915, No. 9) that the Allied Governments made every effort to

discriminate between *bona fide* neutral commerce and that intended for Germany (Note of April 24, 1916, No. 26), and that they had 'tempered the severity' with which their measures might press upon neutrals by imposing penalties less drastic than those invariably inflicted for a breach of the old form of blockade (Note of July 23, 1915, No. 11). To the contention (2) that it was not impartial, she replied that 'the passage of commerce to a blockaded area across a land frontier or across an inland sea has never been held to interfere with the effectiveness of the blockade . . . if the doctrine of continuous voyage may rightly be applied to goods going to Germany through Rotterdam, on what ground can it be contended that it is not equally applicable to goods with a similar destination passing through some Swedish port and across the Baltic or even through neutral waters only?' (Note of April 24, 1916, No. 35).

With reference to the complaint (3) that the long-distance blockade was not effective, Great Britain expressed a doubt whether there had ever been a blockade where the ships which slipped through bore so small a proportion to those which were intercepted (Note of April 24, 1916, No. 33).

<sup>1</sup> For opinions on the legality of the long-distance blockade and the probable development of blockade in the future see the literature quoted before § 390a above. A good deal of light is thrown upon the personal and less public factors in the Anglo-American controversy in Hendrick, *Life and Letters of Walter Hines Page*, i. and ii. (1922), iii. (1925), and in Seymour, *Intimate Papers of Colonel House*, i. and ii. (1926). See also Savage, *Policy of the United States toward Maritime Commerce in War, ii., 1914-1918* (United States, Government Printing Office, 1936); Morissey, *The American Defence of Neutral Rights, 1914-1917* (1939).

They set up departments which investigated the machinery, and the subterfuges, of German overseas trade; they identified goods originating in Germany, by insisting that all exports from adjacent countries should be accompanied by certificates of origin. They induced importers in these countries to form representative associations, and entered into agreements <sup>1</sup> with these associations under which goods consigned to them were generally exempted from interference, in return for a guarantee that neither the goods, nor their products, should reach the enemy in any form. Of such associations the Netherlands Overseas Trust was the first <sup>2</sup>; others were formed in Sweden, Norway, Denmark, and Switzerland.<sup>3</sup> They persuaded many shipping lines, with a view to avoiding the costly delay of elaborate visit and search, to undertake, if so required, to bring back to England any suspected goods which were not discharged at the port of examination, or to store them until the end of the war, or to hand them to their consignees only under stringent guarantees that neither they, nor their products, would reach the enemy. They persuaded other shipping lines only to accept goods for Northern Europe when accompanied by a certificate from the Allied authorities that they would be allowed to pass the blockade.<sup>4</sup> They refused to supply bunker coal to neutral vessels unless their owners would undertake that no vessel owned, chartered, or controlled by them should trade with an enemy port, or carry goods of enemy origin or destination. Finally, they sought to make agreements with representative bodies of neutral traders under which the import of any given article to a neutral country was limited to the amount of its true domestic requirements.<sup>5</sup>

However, the aim of the Allied Governments was not wholly realised, even by these measures, as long as the

<sup>1</sup> See Spaight, *Commerce*, ch. v. ('The Trade-Restriction Agreements of the Great War'), on the potentialities of this policy.

<sup>2</sup> See Vandenbosch, *The Neutrality of the Netherlands during the World War* (1927).

<sup>3</sup> See Guichard, *The Naval Blockade, 1914-1918* (1930, translation from

the French), pp. 137-256, and Turlington, *Neutrality*, vol. iii., *The World War Period* (1936), pp. 67-99.

<sup>4</sup> See below, § 421b, on the 'Navicert' system.

<sup>5</sup> These measures are all described in Parl. Papers, Misc. No. 2 (1916), Cmd. 8145.

United States remained neutral. But after she had entered the war, in April 1917, she prohibited exports to the neutral countries of Northern Europe except under licences which were only given in return for satisfactory guarantees. This she was legally entitled to do, and the isolation of the Central Empires was complete.<sup>1</sup>

§ 390c. The war which broke out with Germany in 1939 brought a repetition of the measures described above as the long-distance blockade. On November 27, 1939, Great Britain issued, as a measure of retaliation against illegal mine-laying and submarine warfare, an Order in Council ordering the seizure, followed by detention or sale, of goods laden in German ports or of German origin or ownership.<sup>2</sup> The Order followed largely the lines of the Order in Council of March 11, 1915. France issued a similar Order.<sup>3</sup> Neither was formally described as a blockade, and there is no doubt that these measures could not be squared with the technical requirements of the law of blockade as generally accepted. But it is equally clear that in so far as modern warfare has assumed a predominantly economic character,<sup>4</sup> some of the

The Long-Distance Blockade after the World War.

<sup>1</sup> See Garner, ii. § 530. And see, generally, on the participation of the United States in the measures of commercial control of the belligerents, Phillips in *A.J.*, xxvii. (1933) pp. 675-693, and Morrissey in *A.J.*, xxxi. (1937) pp. 17-30.

<sup>2</sup> It provided that every merchant-vessel which sailed from an enemy port after December 4, 1939, may be required to discharge in a British or Allied port any goods on board laden in such enemy port and that the same applied to vessels sailing from a port other than an enemy port having on board goods of enemy origin or of enemy property. It was provided that such goods, unless ordered by the Court to be requisitioned by the Crown, shall be detained or sold under the direction of the Court. The proceeds of goods so sold or the goods themselves were to be dealt with at the conclusion of peace in 'such manner as the Court may in the circumstances deem just.'

<sup>3</sup> *J.O.*, November 28. A number of neutral States formally protested against these measures as being con-

trary to International Law. For the Italian protest of March 3, 1940 and the British reply see Cmd. 6191. The United States and Russia reserved the right to claim compensation.

<sup>4</sup> It is this fact of the increased importance of the economic weapon rather than other changes which will probably operate in the future in the direction of reducing the cogency of the claim of neutrals to unimpeded commercial intercourse with the belligerents. Historically, the law of blockade and contraband has been the result of a compromise between the conflicting claims of the neutral States to undisturbed intercourse with both belligerents and other neutrals and the insistence of the belligerents on the right to deprive their opponents of the opportunity of receiving by sea articles which may be useful in war. The substance of the compromise thus achieved has been influenced by the relative military and political strength of the belligerent and the neutral. But the principal factor in shaping the law on the subject has been the circumstance that in the wars of the



rules of the accepted law of blockade have become inapplicable in the changed conditions of naval war and of communications, and that unless altered by agreement they are likely to be honoured more in the breach than in the observance. Thus viewed, measures regularly and uniformly repeated in successive wars in the form of reprisals and aiming at the economic isolation of the opposing belligerent must be regarded as a development of the latent principle of the law of blockade, namely, that the belligerent who possesses the effective command of the sea is entitled to deprive his opponent of the use thereof for the purpose either of navigation by his own vessels or of conveying on neutral vessels such goods as are destined to or originate from him. The principle of ultimate destination<sup>1</sup> and—we may add—of ultimate origin of such goods has rendered irrelevant the fact that the measures in question are ostensibly directed against vessels and goods proceeding to or coming from a neutral port or coast as distinguished from enemy territory proper.

eighteenth and the nineteenth centuries the range of articles of decisive importance for the belligerent was distinctly limited and the inducement to make concessions to the commercial requirements of the neutral correspondingly large. The comprehensiveness of modern warfare has vitally affected the situation. It has, amongst

others, brought into prominence the claim of the belligerent to be entitled to prevent his opponent from using the open sea for conveying on neutral vessels the produce of his territory and thus strengthening his economic position in foreign markets.

<sup>1</sup> See §§ 385, 400-402a

# CHAPTER IV

## CONTRABAND

### I

#### CONCEPTION OF CONTRABAND

Grotius, iii. c. 1, § 5—Bynkershoek, *Quaestiones Juris publici*, i. cc. ix.-xii.—Vattel, iii. §§ 111-113—Hall, §§ 236-247—Lawrence, §§ 253-259—Westlake, ii. pp. 277-302, and *Papers*, pp. 362-392, 461-474, 519-522—Maine, pp. 96-122—Manning, pp. 352-399—Phillimore, iii. §§ 226-284—Twiss, ii. §§ 121-151—Halleck, ii. pp. 243-270—Taylor, §§ 653-666—Walker, §§ 73-75—Wharton, iii. §§ 368-375—Hershey, Nos. 496-512—Moore, vii. §§ 1249-1263—Wheaton, §§ 476-508—Bluntschli, §§ 801-814—Heffter, §§ 158-161—Geffcken in *Holtzendorff*, iv. pp. 713-731—Gareis, § 89—Liszt, § 68—Ullmann, §§ 193-194—Fauchille, §§ 1535-1588 (49)—Despagnet, Nos. 705-715 *ter*—Rivier, ii. pp. 416-423—Nys, iii. pp. 626-670—Calvo, v. §§ 2708-2795—Fiore, iii. Nos. 1591-1601, and *Code*, Nos. 1850-1858—Martens, ii. § 136—Kleen, i. §§ 90-102—Boeck, Nos. 606-659—Pillet, pp. 315-330—Gessner, pp. 70-144—Perels, §§ 44-46—Testa, pp. 201-220—Lawrence, *War*, pp. 140-174—Ortolan, ii. pp. 165-213—Hautefeuille, ii. pp. 69-173—Dupuis, Nos. 199-230, and *Guerre*, Nos. 137-171—Bernsten, § 9—Nippold, ii. § 35—Takahashi, pp. 490-525—Schramm, § 10—Holland, *Prize Law*, §§ 57-87, and *Lectures*, pp. 495-511—Keith's Wheaton, pp. 1027-1053—Hyde, ii. §§ 797-816—Fenwick, pp. 542-552—Rolin, §§ 1201-1246—Mérignhac-Lémonon, ii. pp. 449-498—Hatschek, pp. 341-349—Strupp, *Wört.*, i. pp. 688-694—De Louter, ii. pp. 461-478—Cruchaga, §§ 1309-1355—Gemma, pp. 377-383—Balladore Pallieri, pp. 434-449—Kunz, pp. 264-285—Genet, §§ 572-650—Suarez, §§ 435-442—Verzijl, §§ 80-91, 398-529—Spaight, *Air*, pp. 393-396—U.S. Naval War Code, Articles 34-36—Heineccius, *De navibus ob vecturam vetitaram mercium commissis dissertatio* (1740)—Huebner, *De la saisie des bâtiments neutres*, 2 vols (1759)—Valin, *Traité des prises*, 2 vols. (1763)—Martens, *Essai sur les armateurs, les prises, et surtout les reprises* (1795)—Lampredi, *Del commercio dei populi neutrali in tempo di guerra* (1801)—Tetens, *Considérations sur les droits réciproques des puissances belligérantes et des puissances neutres sur mer* (1805)—Pistoye et Duverdy, *Traité des prises maritimes*, 2 vols. (1855)—Pratt, *The Law of Contraband of War* (1856)—*Letters by Historicus* (1863), pp. 119-145—*Additional Letters by Historicus* (1863), pp. 25-44—Upton, *The Law of Nations affecting Commerce during War* (1863)—Lehmann, *Die Zufuhr von Kriegskonterbandewaren, etc.* (1877)—Kleen, *De contrebande de guerre et des transports interdits aux neutres* (1893)—Vossen, *Die Konterbande des Krieges* (1896)—Hirsch, *Kriegskonterbande und ver-*

*botene Transporte in Kriegszeiten* (1897)—Manceaux, *De la contrebande de guerre* (1899)—Brochet, *De la contrebande de guerre* (1900)—Pincitore, *Il contrabbando di guerra* (1902)—Remy, *Théorie de la continuité du voyage en matière de blocus et de contrebande de guerre* (1902)—Knight, *Des états neutres au point de vue de la contrebande de guerre* (1903)—Wiegner, *Die Kriegskonterbande* (1904)—Atherley-Jones, *Commerce in War* (1907), pp. 1-91 and 253-283—Hold, *Die Kriegskonterbande* (1907)—Hansemann, *Die Lehre von der einheitlichen Reise im Rechte der Blockade und Kriegskonterbande* (1910)—Hirschmann, *Das internationale Prisenrecht* (1912), §§ 24-30—Wehberg, pp. 97-123—Garner, ii. §§ 495-508a, and *Prize Law*, Nos. 384-450—Baty, pp. 248-308—Butler and Maccoby, *The Development of International Law* (1928), pp. 281-291—Lord Eustace Percy, *Maritime Trade in War* (1930), pp. 33-51—Piggott, *The Neutral Merchant* (1915)—Pyke, *The Law of Contraband of War* (1915), and in the *Law Quarterly Review*, xxxii. (1916) pp. 50-69 (the *Kim* case)—Baty, *Prize Law and Continuous Voyage* (1916)—Olivi, *Del contrabbando di guerra* (1919)—Moore, *Current Illusions*, pp. 40-80—Jessup and Deák, *Neutrality*, vol. i., *The Origins* (1935), pp. 50-104—Colombos, §§ 162-188—Westlake, in *R.I.*, ii. (1870) pp. 614-635—Kleen in *R.I.*, xxv. (1893) pp. 7, 124, 239, 389, and xxvi. (1894) pp. 214-217—Bar in *R.I.*, xxvi. (1894) pp. 401-414—Brocher de la Fléchère in *R.I.*, 2nd ser., i. (1899) pp. 337-353—Fauchille in *R.G.*, iv. (1897) pp. 297-323—Kleen in *R.G.*, xi. (1904) pp. 353-362—Gover in the *Journal of Comparative Legislation*, New Ser., ii. (1900) pp. 118-130—Kennedy and Randall in the *Law Quarterly Review*, xxiv. (1908) pp. 59-75, 316-327, and 449-464—General Report presented to the Naval Conference of London by its Drafting Committee, Articles 22-24—Moore in *R.I.*, 2nd ser., xiv. (1912) pp. 221-247—Phillimore in the *Journal of Comparative Legislation*, New Ser., xv. (1915) pp. 223-238—Perrinjaquet in *R.G.*, xxii. (1915) pp. 127-238—Erle Richards in *B.Y.*, 1922-1923, pp. 1-16—Clark, *ibid.*, 1928, pp. 69-83—Warren in *Proceedings of the American Academy of Political Science*, xvi. (1935) pp. 61-70. (Some of the literature mentioned at the head of § 368 also deals with Contraband.)

Definition  
of Contra-  
band of  
War.

§ 391. The term contraband is derived from the Italian 'contrabbando,' which, itself deriving from the Latin 'contra' and 'bannum' or 'bandum,' means 'in defiance of an injunction.' Contraband of war<sup>1</sup> is the designation of such goods as are forbidden by either belligerent to be carried to the enemy on the ground that they enable him to carry on the war with greater vigour. But this definition

<sup>1</sup> Although—see above, §§ 173-174—prevention of carriage of contraband is a means of sea warfare against the enemy, it chiefly concerns neutral commerce, and is, therefore, more conveniently treated with neutrality.—A good short survey of the origin and development of the modern law of contraband is given by Pyke, *The Law of Contraband*

(1915), pp. 29-54. The same work (pp. 100-104) gives an account of the attempt to abolish contraband altogether. For some sixteenth-century traces of the recognition of contraband in English history see Holdsworth, *History of English Law*, v. (1924) pp. 47-49; Jessup and Deák, *op. cit.* (on the early development of the law of contraband).

is only formal, as it does not state what kind of goods belong to the class of contraband. This has been much controverted. Throughout the seventeenth, eighteenth, and nineteenth centuries, the matter stood as Grotius had explained it. Although he did not employ the term contraband, which only came into general use after his time, he treated of the matter, and distinguished<sup>1</sup> three different kinds of articles. Firstly, those which, as arms for instance, can only be made use of in war, and which are, therefore, always contraband. Secondly, those, as for example articles of luxury, which can never be made use of in war, and which, therefore, are never contraband. Thirdly, those which, as money, provisions, ships, and articles of naval equipment, can be made use of in war as well as in peace, and which are, on account of their ambiguous use, contraband or not according to the circumstances of the case. In spite of Bynkershoek's decided opposition<sup>2</sup> to this distinction, the practice of most belligerents has been in conformity with it. A great many treaties have, from the beginning of the sixteenth century, been concluded between many States for the purpose of fixing what articles belonging to the class of ambiguous use should, and what should not, be regarded between the parties as contraband; but these treaties disagree with one another.<sup>3</sup> And, so far as they are not bound by a treaty, belligerents exercise their discretion in every war, according to the special circumstances and conditions, in regarding, or not regarding, certain articles of ambiguous use as contraband. The endeavour of the First and the Second Armed Neutralities of 1780 and 1800 to restrict the number and kinds of articles that could be regarded as contraband failed; and the Declaration of Paris of 1856 uses the term contraband without attempting to define it. By Articles 22-29 of the Declaration of London of 1909 the Powers seemed to have come to an agreement concerning what articles are,

<sup>1</sup> See Grotius, iii. c. 1, § 5: 'Sunt enim res quae in bello tantum usum habent, ut arma: sunt quae in bello nullum habent usum, ut quae voluptati inserviunt: sunt quae et in bello et extra bellum usum habent, ut pecuniae, commeatus, naves, et quae

navibus adsunt. . . . In tertio illo genere usus ancipitis distinguendus erit belli status. . . .'

<sup>2</sup> *Quaestiones Juris publici*, i. c. x.

<sup>3</sup> For a survey of these treaties see Jessup and Deák, cited above.

and what are not, contraband; but the Declaration remained unratified, and the World War has shown that it is impossible to settle once and for all the question what articles are to be considered as contraband. Furthermore, the interests of the States when they are belligerents are opposed to their interests when they are neutrals; and for this reason all States when belligerents take up a different attitude with regard to contraband from that which they take up when neutrals.

Absolute  
and Con-  
ditional  
Contra-  
band, and  
Free  
Articles.

§ 392. Apart from the distinction between articles which can be made use of only in war and those of ambiguous use, two different classes of contraband must be distinguished.

There are, in the first place, articles which by their very character are destined to be used in war. In this class are to be reckoned, not only arms and ammunition, but also such articles of ambiguous use as military stores, naval stores, and the like. These are termed *absolute contraband*. There are, secondly, articles which, by their very character, are not necessarily destined to be used in war, but which, under certain circumstances and conditions, can be of the greatest use to a belligerent for the continuance of the war. To this class belong, for instance, provisions, coal, gold, and silver. These articles are termed *conditional* or *relative contraband*.

Although hitherto not all the States have made this distinction, which is important not only in determining whether or not a particular article is contraband, but also in determining the consequences of carrying contraband,<sup>1</sup> nevertheless they have made a distinction in so far as they varied the list of articles which they declared contraband in their different wars. Certain articles, as arms and ammunition, have always been on the list, whilst other articles were only considered contraband when the circumstances of a particular war made it necessary. The unratified Declaration of London adopted<sup>2</sup> the distinction, but added a third class,<sup>3</sup> to which were assigned all articles which were either not susceptible of use in war, or the possibility of the use of which in war was so remote as practically to make them

<sup>1</sup> See below, § 405.

<sup>2</sup> Articles 23, 24.

<sup>3</sup> Article 27.

not susceptible of use in war. These articles were termed *free articles*.<sup>1</sup>

But although till the outbreak of the World War the distinction between absolute and conditional contraband was certainly correct in theory, and of value in practice, that war has shaken its foundation. It dates from the time when armies were small, and comprised only a very small fraction of the population of the belligerent countries. But during the World War, when, as has already been explained,<sup>2</sup> every fit male in each belligerent State became by choice or compulsion a member of the military forces, when the whole country with all its resources was gradually mobilised, and the means of communication were nationalised and developed to an unprecedented and unforeseen degree, it was widely maintained that the distinction between absolute and conditional contraband was out of date, seeing that a belligerent Government could at any moment, and would if necessary, lay its hand on, and requisition, all articles in the country which were, or might be, of use for carrying on the war.<sup>3</sup>

§ 393. That absolute contraband cannot, and need not, be restricted to arms and ammunition only and exclusively, becomes obvious if it be remembered that other articles, although of ambiguous use, can be as valuable and essential to a belligerent for the continuance of the war. The machinery and material necessary for the manufacture of arms and ammunition are almost as valuable as the latter themselves, and warfare on sea can as little be waged without vessels and articles of naval equipment as without arms and ammunition. But no unanimity exists with regard to such articles of ambiguous use as are to be considered as absolute contraband, and States, when they go to war,

Articles  
absolutely  
Contraband

<sup>1</sup> But there are a number of other free articles, although they do not belong to the articles characterised above; see below, § 396a.

<sup>2</sup> Above, § 57a.

<sup>3</sup> Spaight, *Air*, p. 394, speaking of the disappearance of the distinction between absolute and conditional contraband, says: 'It was founded in a differentiation between the

military and the civilian constituents of a country which national service and the pooling and rationing of all the resources and supplies of a State engaged in a great conflict have proved to be no longer sound. In minor wars, or those of the colonial type (such as the Boer War), the distinction will, however, possibly reappear.' See also Erle Richards, in *B.Y.*, 1922-1923, at p. 16.

increase or restrict, according to the circumstances of the particular war, the list of articles they consider absolute contraband.

But although belligerents must be free to take into consideration the circumstances of the particular war, as long as the distinction between absolute and conditional contraband is upheld it ought not to be left altogether to their discretion to declare any articles they like to be absolute contraband. The test to be applied is whether, in the special circumstances of a particular war, or considering the development of the means used in making war, the article concerned is by its character destined to be made use of for military, naval, or air-fleet purposes because it is essential to those purposes. If not, it ought not to be declared absolute contraband. However, it may well happen that an article which is not by its very nature destined to be made use of in war, acquires this character in a particular war and under particular circumstances ; and in such case it may be declared absolute contraband. Thus, for instance, foodstuffs cannot, as a rule, be declared absolute contraband ; but if the enemy, for the purpose of securing sufficient for his military forces, takes possession of all the foodstuffs in the country, and puts the whole population on rations, foodstuffs acquire the character essential to articles of absolute contraband, and can therefore be declared to be such. Or, to give another example, cotton was not in former wars considered to be absolute contraband, because its use for military purposes was of minor importance ; but nowadays the importance of cotton for the manufacture of high explosives has become so apparent, that during the World War the Allies had, in 1915, to declare it absolute contraband. But, as has been said, the distinction between absolute and conditional contraband threatens to disappear.<sup>1</sup>

Articles 22 and 23 of the Declaration of London distinguished two classes of absolute contraband. Article 22 enumerated eleven groups of articles which might *always*, without special declaration and notice, be treated as absolute

<sup>1</sup> For German cases during the World War on the distinction between absolute and conditional contraband see Verzijl, §§ 416-432.

contraband. Article 23 comprised articles exclusively used for war which were not enumerated amongst the eleven groups of the first class, but might also be treated as absolute contraband *after special declaration and notification*. Such a declaration might be published during time of peace, and notification thereof had then to be addressed to all other Powers; but if the declaration was published after the outbreak of hostilities, a notification had only to be addressed to the neutral Powers. Should a Power—see Article 26—waive the right to treat as absolute contraband any article comprised in the first class, notification thereof had to be made to the other Powers.

The list of articles in the first class embodied a compromise, for it included several articles—such as saddled, draught, and pack animals suitable for use in war—which Great Britain and other Powers formerly only considered as conditional contraband.

However, the Declaration of London remained unratified; and although at the outbreak of the World War Great Britain and her allies adopted most of its rules,<sup>1</sup> they rejected the list of absolute contraband which it contained. During the war they so increased the number of articles of absolute contraband by successive orders that the final British list, dated July 2, 1917, covered two pages of the *London Gazette*.<sup>2</sup> The list of articles of absolute contraband announced at the beginning of the war in 1939 was less detailed but in substance equally comprehensive.<sup>3</sup>

<sup>1</sup> See above, § 292.

<sup>2</sup> July 3, 1917.

<sup>3</sup> A Royal Proclamation, issued in the *London Gazette* on September 4, specified the following goods as articles of absolute contraband:

(a) All kinds of arms, ammunition, explosives, chemicals suitable for use in chemical warfare, and machines for their manufacture or repair; component parts thereof; articles necessary or convenient for their use; materials or ingredients used in their manufacture; articles necessary or convenient for the production or use of such materials or ingredients.

(b) Fuel of all kinds; all contrivances for, or means of transporta-

tion on land, in the water or air, and machines used in their manufacture or repair; component parts thereof; instruments, articles necessary or convenient for their use; materials or ingredients used in their manufacture; articles necessary or convenient for the production or use of all such materials or ingredients.

(c) All means of communication, tools, implements, instruments, equipment, maps, pictures, papers, and other articles, machines, or documents necessary or convenient for carrying on hostile operations; articles necessary or convenient for their manufacture or use.

(d) Coin, bullion, currency, evidence



Articles  
condition-  
ally Con-  
traband.

§ 394. There are many articles which are not by their character destined to be made use of in war, but which are nevertheless of great value to belligerents for the continuance of war. Such articles are conditionally contraband, which means that they are contraband when it is clearly apparent,<sup>1</sup> having regard to the destination of the vessel carrying them, or to their consignee, that they are intended to be used for military or naval purposes. But neither the practice of the several States nor the opinion of writers agree upon the matter, and it is in particular controversial<sup>2</sup> whether or no foodstuffs, horses and other beasts of burden, coal and other fuel, money and the like, and cotton, may conditionally be declared contraband.

(1) That *foodstuffs* should not under ordinary circumstances be declared contraband, there ought to be no doubt. There are even several writers<sup>3</sup> who emphatically deny that they could ever be conditional contraband. But the majority of writers have always admitted that foodstuffs destined for the use of the enemy army or navy might be declared contraband. This has been the practice of Great Britain,<sup>4</sup> the United States of America, and Japan. But in 1885, during her hostilities against China, France declared rice to be absolute contraband, on the ground of the importance of this article to the Chinese population. Again, Russia in 1904, during the Russo-Japanese War, declared rice and provisions to be absolute contraband; on the protest of Great Britain and the United States of America, however, she altered her decision, and treated these articles as conditional

of debt; also metal, materials, dies, plates, machinery or other articles necessary or convenient for their manufacture.

The German Prize Regulations of August 28, 1939 (*Reichsgesetzblatt*, 1939, i. p. 1585) included a list of articles of absolute contraband which, on the whole, followed that of the Declaration of London. On September 12 (*ibid.*, p. 1752) Germany published a new list which was, in substance, identical with that proclaimed by Great Britain on September 4.

<sup>1</sup> See below, § 395.

<sup>2</sup> See Perels, § 45, and Hall, §§ 242-246, who gave bird's-eye views of the controversy.

<sup>3</sup> See, for instance, Bluntschli, § 807. For an interesting discussion of the question of foodstuffs as contraband see the proceedings of the Mixed Commission under Article VII. of the Treaty of 1794 between Great Britain and the United States: Moore, *International Adjudications*, Modern Ser., iv. (1931), in particular the Opinions in *The Neptune*, pp. 372-443.

<sup>4</sup> *The Jonge Margaretha* (1799) 1 C. Rob. 189.

contraband only.<sup>1</sup> Article 24 of the unratified Declaration of London declared foodstuffs to be conditional contraband, and they appeared as conditional contraband in the British<sup>2</sup> and German<sup>3</sup> contraband lists during the World War.

(2) The importance of *horses and other beasts of burden* for cavalry, artillery, and military transport explains their frequently being declared as contraband by belligerents. No argument against their character as conditional contraband can have any basis.<sup>4</sup>

(3) Since men-of-war are nowadays propelled by steam power, the importance of *coal*, and other fuel, for waging war at sea, is obvious. For this reason Great Britain has, ever since 1854, maintained that coal, if destined for belligerent men-of-war or belligerent naval ports, is contraband. But in 1859 France and Italy did not take up the same standpoint. Russia, although in 1885 she declared that she would never consent to coal being regarded as contraband, in 1904 declared coal, naphtha, alcohol, and every other kind of fuel, to be absolute contraband. And she adhered to this standpoint, although she was made to recognise the distinction between absolute and conditional contraband. Article 24 of the unratified Declaration of London declared fuel, and therefore coal, to be conditional contraband, and during the World War Great Britain so treated all fuel, except mineral oils, which were declared absolute contraband in view of their absolute necessity for use in motors, aero-

<sup>1</sup> See the cases of the *Arabia* and the *Calchas* (Hurst, i. pp. 52, 143), in which the Russian Supreme Prize Court recognised the distinction between absolute and conditional contraband.

<sup>2</sup> *London Gazette*, July 3, 1917. The British list referred to in these sections is the final list issued on July 2, 1917.

<sup>3</sup> *London Gazette*, August 7, 1917. The German list referred to in these sections is that promulgated by ordinance on June 25, 1917. There had been many earlier lists.

<sup>4</sup> But they were frequently declared absolute contraband, as, for instance, by Article 36 of the United

States Naval War Code of 1900. Russia, which during the Russo-Japanese War altered the standpoint at first taken up by her, and recognised the distinction between absolute and conditional contraband, nevertheless adhered to her declaration of horses and beasts of burden as absolute contraband. The unratified Declaration of London, by Article 22, also declared them to be absolute contraband, and they so figured in the British and German contraband lists during the World War. They were clearly covered by the expression 'all means of transportation' in the list of absolute contraband published in Great Britain in September 1939.

planes, and submarines. Germany declared coal, coke, and mineral oils to be absolute contraband, and other fuel to be conditional contraband.

(4) As regards *money*, unwrought precious metals which may be coined into money, bonds, and the like, the mere fact that a neutral is prohibited by his duty of impartiality from granting a loan to a belligerent ought to bring conviction that these articles are certainly contraband if destined for the enemy State or its forces. However, these articles are seldom brought by neutral vessels to belligerent ports, since under the modern conditions of trade belligerents can be supplied in other ways with the necessary funds. Be that as it may, in 1916, during the World War, the Allies, who at the beginning of the war had declared gold, silver, and paper money to be *conditional* contraband, proclaimed that they would thenceforth treat gold, silver, paper money, all negotiable instruments, and the like, as *absolute* contraband. These articles figured as absolute contraband in the German list.

(5) As regards *raw cotton*, it is asserted<sup>1</sup> that in 1861, during the Civil War, the United States declared it absolute contraband under quite peculiar circumstances, since it took the place of money sent abroad for the purpose of paying for vessels, arms, and ammunition. But this assertion is erroneous.<sup>2</sup> Be that as it may, raw cotton could not, prior to the World War, properly be considered absolute contraband. For this reason Great Britain protested when Russia in 1904, during the Russo-Japanese War, declared raw cotton to be absolute contraband; but although Russia at first seemed inclined to give way<sup>3</sup> to this protest, she finally adhered to her original attitude. Article 28 of the unratified Declaration of London put raw cotton on the free list, and during the World War the Allies at first did not declare it

<sup>1</sup> See Hall, § 246; Taylor, § 662; Wharton, iii. § 373.

<sup>2</sup> See Moore, vii. § 1254, and Holland, *Letters to 'The Times' upon War and Neutrality* (3rd ed., 1921), pp. 151-155.

<sup>3</sup> See the decision of the Supreme Prize Court in the case of the *Calchas* (May 7, 1905, see Hurst, i. p. 143); whereas in the case of the *St. Kilda* (Dec. 11, 1908, see Hurst, i. p. 202) this same court decided that raw cotton was absolute contraband.

contraband. But in time its importance for the manufacture of high explosives became so apparent that they declared to be *absolute* contraband: 'raw cotton, linters, cotton waste, cotton yarns, cotton piece-goods, and other cotton products capable of being used in the manufacture of explosives.'<sup>1</sup> Cotton also figured as absolute contraband in the German list.

By the unratified Declaration of London two classes of conditional contraband were distinguished.

Article 24 enumerated fourteen groups of articles which might *always*, without special declaration and notice, be treated as conditional contraband. Article 25 consisted of articles which were not enumerated, either amongst the eleven groups of absolute contraband contained in Article 22, or amongst the fourteen groups of conditional contraband contained in Article 24, but were nevertheless susceptible of use in war as well as for purposes of peace: these might also be treated as conditional contraband, but *only after special declaration and notification*. With regard to this declaration and notification, the same procedure was to be followed as in the case of absolute contraband.<sup>2</sup>

But the list contained in the unratified Declaration of London was not adopted by Great Britain during the World War. While at first only slight alterations were made in it, it was varied by successive orders, and the final list contained in the proclamation of July 2, 1917, comprised some thirty-four kinds of articles classed as conditional contraband.<sup>3</sup> At the beginning of the war in 1939 conditional contraband was declared generally to comprise all kinds of foodstuffs, feed, forage, and clothing, and articles and materials used in their production.<sup>4</sup>

<sup>1</sup> See Garner, ii. § 498.

<sup>2</sup> See above, § 393.

<sup>3</sup> *London Gazette*, July 3, 1917. Among them were: Bladders, boots and shoes suitable for use in war, packs, clothing suitable for use in war, docks, field-glasses, foodstuffs, forage, fuel (other than mineral oils, which were absolute contraband), guns, harness, horse-shoes, nautical instruments, certain oils and fats together with oleaginous seeds, nuts and kernels, railway, telegraph, and

telephone materials, vehicles available for use in war (other than motors, which were absolute contraband), vessels of all kinds (other than warships, which were absolute contraband).

<sup>4</sup> *London Gazette*, September 4, 1939. Argentina, Soviet Russia, and some other States protested against the inclusion of foodstuffs in the contraband list. The Final Act of October 3, 1939, of the meeting of Foreign Ministers of the American

Hostile  
Destina-  
tion  
essential  
to Contra-  
band.

§ 395. Whatever may be the nature of articles, they are never contraband unless they are destined <sup>1</sup> for the use of a belligerent in war. Arms and ammunition destined for a neutral are as little contraband as other goods with the same destination. Hostile destination, which is essential even for articles which are obviously used in war, is all the more important for such articles of ambiguous use as are only conditionally contraband. Thus, for instance, provisions and coal are perfectly innocent and not at all contraband if they are destined for use by a neutral.<sup>2</sup>

The unratified Declaration of London, in Articles 30 to 36, comprised every detailed rule<sup>3</sup> with regard to hostile

Republics at Panama (see above, p. 504) registered opposition to the placing on lists of contraband of food-stuffs and clothing intended for civilian populations and not destined directly or indirectly for the use of a belligerent Government or its armed forces: *International Conciliation*, January 1940, No. 356, p. 23; *A.J.*, xxxiv. (1940), Suppl., p. 14. The German list of articles of conditional contraband published on September 12, 1939, was a literal reproduction of the British list: *Reichsgesetzblatt*, 1939, i. p. 1752.

<sup>1</sup> Goods are destined for the use of a belligerent in war, not only when they are shipped to an enemy consignee, but also when they are shipped, after the outbreak of war, by a neutral consignor to a neutral consignee with the intention that they should ultimately become the property of the enemy. The fact that at the time of capture the legal property in the goods had not passed from the consignor does not matter, because in such case capture is regarded as delivery and the goods are treated in a Prize Court as enemy property. See *The Louisiana* [1918] A.C. 461; 3 B. and C.P.C. 60, and distinguish *The Kronprinzessin Victoria* [1919] A.C. 261; 3 B. and C.P.C. 247. See also *The Rijn* [1917] P. 145; 2 B. and C.P.C. 507; [1919] A.C. 546; 3 B. and C.P.C. 362; *The Hellig Olav* [1919] A.C. 526; 3 B. and C.P.C. 258; *The Noordam* (1918) 3 B. and C.P.C. 317; *The Kronprins Gustaf* [1919] P. 182;

3 B. and C.P.C. 432; *The Orange Nassau* [1919] P. 346; 3 B. and C.P.C. 638; *The Urna* [1920] A.C. 899; 3 B. and C.P.C. 595; *The Norne* [1921] 1 A.C. 765; 3 B. and C.P.C. 977. In determining what is the ultimate destination of a ship, the important factor is 'the intention of the person who is in a position to control the destination'—*The Louisiana*, *supra*; *The Twee Ambt* [1920] P. 413; 3 B. and C.P.C. 730.

<sup>2</sup> However, the destination of the articles must not be confused with the destination of the vessel which carries them. For, on the one hand, certain articles with a hostile destination are considered contraband although the carrying vessel is destined for a neutral port, and, on the other hand, certain articles, although they are without a hostile destination, are considered contraband because the carrying vessel is to touch at an intermediate enemy port and is, therefore, destined for such port, although her ultimate destination is a neutral port.

<sup>3</sup> (1) The destination of articles of absolute contraband was, according to Article 30, to be considered hostile if it were shown that they were being sent either to enemy territory, or to territory occupied by the enemy, or to the armed forces of the enemy; and, according to Article 31, hostile destination of absolute contraband was to be considered as completely proved, (i) when the goods were consigned to an enemy port or to the armed forces of the enemy, or (ii) when the vessel was to call at enemy

destination, distinguishing clearly between the characteristics of hostile destination in the case of absolute contraband

ports only, or was to touch at an enemy port, or meet the armed forces of the enemy, before reaching the neutral port to which the cargo concerned was consigned.

(2) The destination of articles of conditional contraband, on the other hand, was, according to Article 33, considered to be hostile if they were intended for the use of the armed forces, or of a government department, of the enemy State, unless in this latter case the circumstances showed that the articles could not in fact be used for warlike purposes. (See *The Constantinos* (1916) 2 B. and C.P.C. 140, where the Egyptian Prize Court held that the owner of certain conditional contraband consigned to Smyrna had established that it was for private consumption. In *The Norne* [1921] 1 A.C. 765; 3 B. and C.P.C. 977, a case of conditional contraband (oranges) shipped to a neutral port, the Privy Council refused to hold that 'the mere fact that goods will be offered for sale by auction at the port of arrival is itself conclusive of the innocency of their destination.') Gold and silver in coin or bullion and paper money were, however, in every case to be regarded as having a hostile destination if intended for a government department of the enemy State. According to Article 34, hostile destination of conditional contraband was to be presumed, unless the contrary was proved, when the articles were consigned, (i) to enemy authorities, or to an enemy contractor established in the enemy country who as a matter of common knowledge supplied articles of this kind to the enemy, or (ii) to a fortified place of the enemy or to another place serving as a base—whether of operations or supply—for the armed forces of the enemy. (During the World War—see the British Note of February 19, 1915, to the United States in *A.J.*, ix. (1915), Suppl., p. 176—Germany claimed to treat practically every town or port on the English East Coast as a fortified place and base of operations. Moreover, one of her cruisers sank the neutral Dutch

vessel *Maria* in September 1914, while carrying grain (conditional contraband) from California to Dublin and Belfast, on the ground that Dublin and Belfast served as bases for the armed forces of Great Britain. See Garner, ii. §§ 486, 508, and text of the decision in *Z.V.*, ix. (1916) p. 408, and in *A.J.*, x. (1916) p. 927. Again—see the German Note to the United States of April 5, 1915, in *A.J.*, ix. (1915), Special Suppl., p. 181—Germany justified the sinking of the American vessel *William P. Frye* carrying a cargo of wheat to Queens-town, Falmouth, or Plymouth on the ground that these ports were 'strongly fortified English coast places, which, moreover, serve as bases for the British naval forces': Hyde, ii. § 758. See also *The Zearend*, *Gratius Annuaire*, 1919-1920, p. 79; and, for other cases, *Verzijl*, § 461.) On the other hand, if the articles were not so consigned, and if the contrary was not proved, their destination was presumed to be non-hostile. In the case of a merchantman which could herself be conditional contraband (see below, § 397), if bound to a fortified place of the enemy, or to another place serving as a base for the armed forces of the enemy, there was to be no presumption of a hostile destination, but a direct proof was to be necessary that she was destined for the use of the armed forces, or of a government department, of the enemy State.

As to the fate of the relevant provisions of the Declaration of London during the World War see below, § 403a. Eventually, by the Maritime Rights Order in Council of July 7, 1916, the Declaration of London was abandoned, and it was provided that 'the hostile destination required for the condemnation of contraband articles shall be presumed to exist, until the contrary is shown, if the goods are consigned to or for an enemy authority, or an agent of the enemy State, or to or for a person in territory belonging to or occupied by the enemy, or to or for a person who during the present hostilities has forwarded contraband goods to an

and of conditional contraband. These rules, with modifications and additions, were adopted by the Allies in the World War until the abandonment of the Declaration by the Maritime Rights Order in Council of July 7, 1916.

Free  
Articles.

§ 396. It is obvious that such articles as are not susceptible of use in war may never be declared contraband, whether their destination be hostile or not.

The unratified Declaration of London, by Article 27, expressly recognised this, and in Article 28—in a so-called *free list*—enumerated seventeen groups of articles which might never be declared contraband in spite of their hostile destination. This free list was, however, not adopted by the Allies during the World War; several articles enumerated therein were declared contraband, and thereby the free list obviously lost all value. In the future, as in the past, it will remain for the belligerents to consider whether or no they will treat an article as free, provided that they do not violate the general principle<sup>1</sup> that only such articles may be declared contraband as enable the enemy to carry on the war with greater vigour.

Articles  
destined  
for the  
use of the  
Carrying  
Vessel, or  
to aid the  
Wounded.

§ 396*a*. However, there are two groups of articles which must always be recognised as free.

In the first place, those articles which serve exclusively to aid the sick and wounded may never be treated as contraband even if their destination is hostile. They may, however, in case of urgent military necessity, and subject to the payment of compensation, be requisitioned, if they are des-

enemy authority, or an agent of the enemy State, or to or for a person in territory belonging to or occupied by the enemy, or if the goods are consigned "to order," or if the ship's papers do not show who is the real consignee of the goods.'

The French Instructions of 1934 lay down that hostile destination of absolute contraband is proved if the goods are consigned to an enemy agent in a neutral port or are consigned to order or without the name of the consignee to a neutral port which since the beginning of hostilities has habitually served as a port of transit for the enemy (Articles 44 (3) and 43 (2)).

With regard to conditional contraband the same Instructions establish a rebuttable presumption of government destination 'if the enemy Government has taken measures of general requisition or of supervision of distribution' of goods of the same character provided that the goods are consigned to an enemy port, to a neutral port if the vessel is to touch an enemy port or come into contact with enemy forces before arriving at a neutral port, or to a neutral port which is habitually used as a transit port for the enemy and if the goods are consigned to order or have no consignee (Article 47 (2)).

<sup>1</sup> See above, § 391.

tined to territory belonging to, or occupied by, the enemy, or to his armed forces. The unratified Declaration of London laid down this rule, and it was adopted during the World War.

Secondly, articles intended for the use of the vessel in which they are found, or for the use of her crew and passengers during the voyage, can never be contraband. Hostile destination being essential before any kinds of articles may be considered contraband, those articles which are carried by a vessel manifestly for her own use, or for the use of her crew and passengers, must be free.<sup>1</sup> Merchantmen frequently carry a gun and a certain amount of ammunition for the purpose of signalling, and, if they navigate in parts of the sea where there is danger of piracy, they frequently carry a certain amount of arms and ammunition for defence against an attack by pirates. It will not be difficult either for the searching belligerent man-of-war or for the Prize Court to ascertain whether or no such arms and ammunition are carried *bona fide*.<sup>2</sup>

§ 397. A neutral vessel, whether carrying contraband or not, can herself be contraband. Such is the case when she has been built or fitted out for use in war and is on her way to the enemy. Although it is the duty of neutrals<sup>3</sup> to employ the means at their disposal to prevent the fitting out, the arming, or the departure of any vessel within their jurisdiction which they have reason to believe is intended to cruise or to engage in hostile operations against a belligerent, their duty of impartiality does not compel them to prevent their subjects from supplying a belligerent with vessels fit for use in war except where they have been built or fitted out by his order. Subjects of neutrals may therefore—unless prevented from so doing by Municipal Law, as, for instance, are persons within the British Empire by §§ 8 and 9 of the Foreign Enlistment Act, 1870—by way of trade supply a belligerent with vessels of any kind, provided that they have not been built or fitted out by his order. According to the practice which prevailed prior to the World

Contra-  
band  
Vessels.

<sup>1</sup> Article 29 of the unratified Declaration of London comprised this rule likewise.

<sup>2</sup> See above, § 181a, on Defensively Armed Merchantmen.

<sup>3</sup> See Article 8 of Convention XIII., and above, §§ 334, 350.



War, such vessels, being equivalent to arms, used to be considered as absolute contraband<sup>1</sup>; and they need not necessarily have been fit for use as men-of-war; it sufficed that they were fit to be used for the transport of troops and the like.

According to Articles 22, 24, and 34 of the unratified Declaration of London, a distinction was to be made between warships and other vessels. Warships, including their boats, and distinctive component parts which by their nature could only be used on a vessel of war, might be treated as *absolute* contraband without notice. Vessels, craft, and boats of all kinds, and further, floating docks, parts of docks and their component parts, might only be treated as *conditional* contraband, but might be so treated without notice.

During the World War the Allies adopted these rules of the Declaration of London.<sup>2</sup>

## II

### CARRIAGE OF CONTRABAND

See the literature quoted above at the commencement of § 391.

Carriage  
of Contra-  
band  
Penal by  
the Muni-  
cipal Law  
of Belligerents.

§ 398. The guaranteed freedom of commerce making the sale of articles of all kinds to belligerents by subjects of neutrals legitimate, articles of conditional as well as absolute contraband may be supplied by sale to either belligerent by these individuals. Moreover, the carriage of such articles by neutral merchantmen on the open sea is as legitimate as their sale, in the sense that the neutral States are under no duty to prohibit them.<sup>3</sup> But belligerents have, by the Law

<sup>1</sup> *The Richmond* (1804) 5 C. Rob. 325. See also Twiss, ii. § 148, and Holland, *Prize Law*, § 86.

<sup>2</sup> See above, §§ 393, 394.

<sup>3</sup> Professor Oppenheim (see 4th ed.) was emphatically of the view that carriage of contraband was not contrary to International Law. See *The Prins der Nederlanden* (1921) 1 A.C. at p. 760; 3 B. and C.P.C. at p. 951. But see, in favour of the view that the carrier of contraband violates an injunction of International Law, Pyke, *The Law of Contraband* (1915), pp. 89-95; and Hyde, ii. § 814, and in *Proceedings of the American Academy*

of *Political Science*, xvi. (1935) pp. 4, 5, quoting in support of the same view, Moore, in *Proceedings of American Philosophical Society*, 51, No. 203. In their Dissenting Opinion in the case of the *Wimbledon* Judges Anzilotti and Huber described commerce in and transport of contraband as 'regarded under the law of nations as unlawful because it assumes the guise of peaceful commerce for warlike purpose': Series A, No. 1, p. 42. Article 1 of the Habana Convention of 1928 on Maritime Neutrality (see above, § 68) refers to vessels conveying cargo 'prohibited by international law.'

of Nations, the right to prohibit and punish the carriage of contraband by neutral merchantmen, and the carrier of contraband violates, for this reason, an injunction of the belligerent concerned. In contradistinction to former practice, which interdicted all trade between neutrals and the enemy, the principle of freedom of commerce between subjects of neutrals and either belligerent has gradually become universally recognised; but this recognition included from the beginning the right of either belligerent to punish carriage of contraband on the sea. And the reason obviously is the necessity for belligerents, in the interest of self-preservation, to prevent the import of such articles as may strengthen the enemy, and to confiscate the contraband cargo, and, in certain cases, the vessel also, as a deterrent to other vessels.

The present condition of the matter of carriage of contraband is therefore a compromise. In the interest of the generally recognised principle of freedom of commerce between belligerents and subjects of neutrals, International Law does not require neutrals to prevent their subjects from carrying contraband<sup>1</sup>; on the other hand, International Law empowers either belligerent to prohibit and punish carriage of contraband, just as it empowers either belligerent to prohibit and punish breach of blockade.<sup>2</sup>

§ 399. The simplest case of carriage of contraband occurs where a vessel is engaged in carrying to an enemy port such goods as are contraband and have a hostile destination.<sup>3</sup> In such cases, it makes no difference whether the fact that the vessel is destined for an enemy port becomes apparent because her papers show that she is bound to such a port, or because she is found at sea sailing on a course for an enemy port, although her papers show her to be bound to a neutral port. Further, it makes no difference, at any rate

Direct  
Carriage  
of Contra-  
band.

<sup>1</sup> See *Ex parte Chavasse, in re Grazebrook* (1885) 34 L.J.N.S., Bank. 17. The same applies to blockade-running and rendering unneutral service; see *The Helen* (1885) L.R. 1 A. and E. 1. See Garner, *Prize Law*, Nos. 391-418, for a detailed treatment of the question of hostile destination.

<sup>2</sup> See above, § 383.

<sup>3</sup> The destination of the cargo being hostile, it does not matter that the cargo is intended to be re-shipped to a neutral country after having undergone a certain course of treatment. The hostile destination makes it contraband: *The Axel Johnson*; *The Drothing Sophia* [1921] 1 A.C. 473; 3 B. and C.P.C. 871.

according to the hitherto prevailing practice of Great Britain and the United States of America, that she is ultimately bound for a neutral port, and that the articles concerned are, according to her papers, destined for a neutral port, if only she is to call at an intermediate enemy port, or if she is to meet enemy naval forces at sea in the course of her voyage to the neutral port of destination<sup>1</sup>; for otherwise the door would be open to deceit, and it would always be pretended that goods which a vessel was really carrying to the intermediate enemy places were intended for the neutral port of ultimate destination. For the same reason, a vessel carrying such articles as are contraband when they have a hostile destination is considered to be carrying contraband if her papers show that her destination is dependent upon contingencies under which she may have to call at an enemy port, unless she proves that she has abandoned the intention of calling there in any event.<sup>2</sup>

Circuitous  
Carriage  
of Con-  
traband  
(Doctrine  
of Con-  
tinuous  
Voyage).

§ 400. A more usual case of carriage of contraband occurs

<sup>1</sup> See Holland, *Prize Law*, § 69.

<sup>2</sup> *The Imina* (1800) 3 C. Rob. 167; and *The Tendre Sostre* (1800) cited in *The Lisette* (1806) 6 C. Rob. 390 (n.).

The unratified Declaration of London distinguished between carriage of absolute and of conditional contraband:

As regards *absolute* contraband, a vessel was, according to Article 32, considered to be carrying contraband whether the fact that she was destined for an enemy port became evident because her papers showed that she was bound for such a port, or because she was found at sea sailing for an enemy port, although her papers showed her to be bound for a neutral port. Moreover, according to Article 31, it was to make no difference that the vessel was bound for a neutral port and that the articles concerned were, according to her papers, destined for a neutral port, if only she was to touch at an intermediate enemy port, or was to meet armed forces of the enemy before reaching the neutral port to which the goods in question were consigned.

As regards *conditional* contraband, a vessel was, according to Article 35,

to be considered as carrying contraband if her papers showed her to be destined for an enemy port, or if, being clearly found out of her course to a neutral port indicated by her papers, she was unable to give adequate reasons to justify such deviation.

Articles 32 and 35 both stipulated that ship's papers were to be conclusive proof as to the destination of the vessel and of the cargo, unless the vessel was clearly found out of the course indicated by them; but the Report of the Drafting Committee emphasised that this rule must not be interpreted too literally, since otherwise fraud would be made easy. Ship's papers are conclusive proof—so ran the Report—*unless facts show their evidence to be false*.

From the outbreak of the World War until July 1916, the Allies adopted Articles 32 and 35 as regards direct carriage of contraband, though they modified Article 35 in other important respects (see below, § 403a). By the Maritime Rights Order in Council of July 7, 1916, they abandoned the rules of the Declaration altogether. See also Holland, *Prize Law*, § 70.

when a neutral vessel carrying such articles as are contraband if they have a hostile destination is, according to her papers, ostensibly bound for a neutral port, but is intended, after having called there, and perhaps delivered her cargo there, to carry it on (re-shipping it if need be) from there to an enemy port. If we analyse that vessel's voyage into two parts, the first from her port of starting to the neutral port, and the second from the neutral port to the enemy port, there is, of course, no doubt that she is carrying contraband whilst engaged in carrying the articles concerned on the second part of her voyage, namely, from the neutral to the enemy port. But, during the American Civil War,<sup>1</sup> the question arose whether she may already be considered to be carrying contraband during the first part, namely, from the port of starting to the neutral port from which she is afterwards to carry the cargo to an enemy port; since she is really intended to carry the cargo from the port of starting to an enemy port, although not directly, but by a round-about way. The American Prize Courts answered the question in the affirmative by applying to the carriage of contraband the principle of *dolus non purgatur circuitu* and the so-called 'doctrine of continuous voyage,' which means that in effect the whole voyage must be treated as one continuous and indivisible voyage.<sup>2</sup> This attitude of the American Prize

<sup>1</sup> Hyde, ii. § 808, says: 'At the beginning of the nineteenth century the courts of England, and possibly those of America, were familiar with the application of the doctrine of continuous voyage to questions relating to contraband'; and he cites *The Twende Brodre* (1801) 4 C. Rob. 33; *The William* (No. 2) (1806) 5 C. Rob. 385; and Story J. in *The Commercen* (1816) 1 Wheat. 382; Scott, *Cases*, p. 973. The evidence in support of Hyde's statement to be extracted from these cases seems to be slender. The first contains an *obiter* remark by Lord Stowell to the effect that a claimant would not be permitted to aver that a cargo of conditional contraband was going to an innocent destination and was intended to be sent on thence to a hostile one; the second is an instance of the applica-

tion of the doctrine to the 'rule of 1756'; while the third is commented upon in Oppenheim's note to § 401, below. See also Rolin, § 1227; Strupp, *Grundzüge*, p. 211; and Pohl in *Strupp, Wört.*, i. p. 203. The doctrine of continuous voyage was applied by Lord Stowell in 1801 to the offence of 'trading with the enemy' (see *The Jonge Pieter* (1801) 4 C. Rob. 79).

<sup>2</sup> The so-called doctrine of continuous voyage dates from the time of the Anglo-French wars at the end of the eighteenth century, and is generally regarded as connected with the application of the so-called 'rule of 1756' (see above, § 289)—a view which may have to be revised in the light of recent evidence (see in particular the article of Llewelyn Davies cited in this note). Neutral

Courts has called forth protests from many writers,<sup>1</sup> British as well as foreign; but Great Britain did not protest, and from the attitude of the British Government in the case of the *Byndesrath* and other vessels in 1900 during the South African War, it was possible to conclude, although only by inference, that she considered the practice of the American

vessels engaged in French and Spanish colonial trade, which had been thrown open to them during the war, sought to evade seizure by British cruisers and condemnation by British Prize Courts according to the 'rule of 1756,' by taking their cargo to a neutral port, landing it and paying import duties there, and then re-loading it and carrying it to the mother-country of the particular colony. Thus in *The William* (1806) 5 C. Rob. 385, it was proved that this neutral vessel took a cargo from the Spanish port of La Guira to the port of Marblehead in Massachusetts—the United States being neutral—landed the cargo, paid import duties there, then re-shipped the greater part of it, and, in addition, other goods, and sailed after a week for the Spanish port of Bilbao. In all such cases, the British Prize Courts considered the voyages from the colonial port to the neutral port and from there to the enemy port as one continuous voyage, and confirmed the seizure of the ships concerned. See Reddie, *Researches*, i. pp. 307-313; *Additional Letters by Historicus* (1863), pp. 25-44; Remy, *Théorie de la continuité du voyage en matière de blocus et de contrebande* (1902); Hanseemann, *Die Lehre von der einheitlichen Reise im Rechte der Blockade und Kriegskontrabande* (1910); Fauchille in *R.G.*, iv. (1897) pp. 297-323; Arias and Baldwin in *A.J.*; ix. (1915) pp. 583-593, 793-801; Baty, *Prize Law and Continuous Voyage* (1915), and in *Law Quarterly Review*, xxxviii. (1922) pp. 359-370, and in *Grotius Society*, ix. (1924) pp. 101-117; Hyde, §§ 808-813; Briggs, *The Doctrine of Continuous Voyage* (1926); Keith's Wheaton, pp. 1054-1068; Gantebein, *The Doctrine of Continuous Voyage, particularly as applied to Contraband and Blockade* (1929); Jessup and Deák,

*Neutrality*, i.: *The Origins* (1935), pp. 152-156; Kulsrud, *Maritime Neutrality to 1780* (1936); Pares, *Colonial Blockade and Neutral Rights, 1739-1763* (1938); Mootham in *E.Y.*, 1927, pp. 62-80, who gives a survey of the application of the doctrine during the Seven Years' War and during the Napoleonic Wars; and Llewelyn Davies, *ibid.*, 1934, pp. 21-35, who traces it back to the Anglo-Dutch wars of 1664-1667 and 1672-1674. For a summary of the application of the doctrines of continuous voyage and continuous transport in different spheres of law see Pitt Cobbett, *Leading Cases*, ii. pp. 613-640. The American courts have applied the doctrine of continuous voyage not only to carriage of contraband but also to blockade; see above, § 385 (4), where the cases of *The Bermuda* and *The Stephen Hart* are quoted. See also Judson in *A.S. Proceedings*, ix. (1915) pp. 104-111.

<sup>1</sup> See, for instance, Hall, § 247. But Phillimore, iii. § 227, p. 391, says of the judgments of the Supreme Court of the United States in the cases of *The Bermuda* (1865) 3 Wall. 514, and *The Peterhoff* (1866) 5 Wall. 49, that they 'contain very valuable and sound expositions of the law, professedly, and for the most part really, in harmony with the earlier decisions of English Prize Courts.' On the other hand, Phillimore, iii. § 398, p. 490, disagrees with the American courts upon the application of the doctrine of continuous voyage to breach of blockade, and reprobates the decision in the case of *The Springbok* (1866) 5 Wall. 1. See also Baty, pp. 280-308, who regards the application of the doctrine of continuous voyage in the course of the World War as a departure from the fundamental principles of the law of prize.

Prize Courts to be correct and just, and that, when a belligerent, she intended to apply the same principles.<sup>1</sup>

§ 401. A similar case arises when neutral vessels carry to neutral ports such articles as are contraband if bound for a hostile destination, arrangements having been made (of which the vessel may or may not be aware) for the articles to be sent afterwards by land or by sea<sup>2</sup> to the enemy.<sup>3</sup> Long before the World War the question had arisen whether such vessels while on their voyage to the neutral port might be considered to be carrying contraband of war.<sup>4</sup> As early as 1855, during the Crimean War, the French Conseil-Général des Prises, in condemning the cargo of saltpetre of the Hanoverian neutral vessel *Vrow Houwina*, answered the question in the affirmative<sup>5</sup>; but it was not until the American Civil War that the question was decided on principle. Since goods first brought from more distant neutral ports were shipped from the British port of Nassau, in the Bahamas, and from other neighbouring neutral ports, to the blockaded coasts of the Southern States near by, Federal cruisers seized several vessels destined for, and actually on their voyage to, Nassau and other neutral ports, because all or parts of their cargoes were ultimately destined for the enemy. The American courts considered those vessels to be carrying contraband, although they were sailing from one neutral port to another, on clear proof that the goods concerned were destined to be transported by land

Indirect  
Carriage  
of Con-  
traband  
(Doctrine  
of Con-  
tinuous  
Transportation).

<sup>1</sup> See also Holland, *Manual of Naval Prize Law*, § 71.

<sup>2</sup> In another vessel.

<sup>3</sup> See Lawrence, § 257, who points out that this development of the doctrine of continuous voyage deals with goods rather than ships.

<sup>4</sup> The question is treated with special regard to the case of the *Bundesrath* by Dundas White in the *Law Quarterly Review*, xvii. (1901) pp. 12-25, and De Hart, *ibid.*, pp. 193-200. See also Baty, *International Law in South Africa* (1900), pp. 1-44.

<sup>5</sup> See Calvo, v. § 2767, p. 52. The case of the Swedish neutral vessel the *Commercen*, which was decided in 1816 (1 Wheaton 382), and which

is frequently quoted with that of the *Vrow Houwina*, is not a case of indirect carriage of contraband. The *Commercen* was on her way to Bilbao, in Spain, carrying a cargo of provisions for the English army in Spain, and she was captured by a privateer commissioned by the United States of America, which was then at war with England. When the case came before Mr. Justice Story in 1816, he reprobated the argument that the seizure was not justified because a vessel could not be considered to be carrying contraband when on her way to a neutral port, and he asserted that the hostile destination of goods was sufficient to justify the seizure of the vessel.

or sea from the neutral port of landing into the enemy territory. The leading cases are those of the *Springbok* and the *Peterhoff*,<sup>1</sup> for the courts found the seizure of these and other vessels justified on the ground of carriage of contraband as well as on the ground of breach of blockade. Thus another application of the doctrine of continuous voyage came into existence, since vessels, whilst sailing between two neutral ports, could only be considered to be carrying contraband when the transportation, first from one neutral port to another, and afterwards from the second neutral port to the enemy territory, was regarded as one continuous voyage. This new application of the doctrine of continuous voyage is fitly termed 'the doctrine of continuous transportation.'<sup>2</sup>

The Case  
of the  
*Bundes-  
rath*.

§(402) The application of the doctrine of continuous voyage under the new form of continuous transportation was likewise condemned by many British and foreign writers ; but Great Britain did not protest in this case either —on the contrary, as was mentioned above,<sup>3</sup> she declined to interfere in favour of the British owners of the vessels and cargoes concerned. And that she really considered the practice of the American courts just and sound became clearly apparent from her attitude during the South African War. When, in 1900, the *Bundesrath*, *Herzog*, and *General*, German vessels sailing from German neutral ports to the Portuguese neutral port of Lorenzo Marques in Delagoa Bay, were seized by British cruisers under the suspicion of carrying contraband, Germany demanded their release, maintaining that no carriage of contraband could be said to take place by vessels sailing from one neutral port to another. But Great Britain refused to admit this principle, maintaining that articles ultimately destined for the enemy were contraband, although the vessels carrying them were bound for a neutral port.<sup>4</sup> In adopting that attitude the British Government departed from the view expressed in

<sup>1</sup> Above, § 385 (4).

<sup>2</sup> See Sir Samuel Evans in *The Kim* [1915] P. at p. 275 and 1 B. and C.P.C. at p. 481.

<sup>3</sup> § 385 (4).

<sup>4</sup> See Parl. Papers, Africa, No. 1 (1900). The vessels were taken into Durban, and, when search had dispelled suspicion, were released without trial: see below, § 433.

the works of some of the prominent British<sup>1</sup> writers on International Law, in the *Manual of Naval Prize Law*, edited by Professor Holland,<sup>2</sup> in 1888, and 'issued by authority of the Lords Commissioners of the Admiralty,' and from occasional pronouncements of British courts.<sup>3</sup> But that departure had behind it the authority both of numerous British decisions in the seventeenth and eighteenth centuries<sup>4</sup> and of the changed conditions of international transport.

§ 403. Although the majority of Continental writers condemned the doctrine of continuous transportation, several eminent Continental authorities supported it.<sup>5</sup> Moreover, the attitude of several Continental States was in favour of the American practice. Thus, according to §§ 4 and 6 of the Prussian Regulations of 1864 regarding Naval Prizes, it was the hostile destination of the goods, or the destination of the vessel to an enemy port, which made a vessel appear as carrying contraband and which justified her seizure. In Sweden the same was valid.<sup>6</sup> Thus, further, an Italian Prize Court during the war with Abyssinia in 1896 justified the seizure in the Red Sea of the Dutch vessel *Doelwijk*,<sup>7</sup> which had sailed for the

Continental  
Support  
to the  
Doctrine  
of Continuous  
Transportation.

<sup>1</sup> See, for instance, Hall, § 247, and Twiss in the *Law Magazine and Review*, xii. (1877) pp. 130-158. See also the papers re-edited by Baty under the title *Prize Law and Continuous Voyage* (1915).

<sup>2</sup> In § 73 the *Manual* laid down the following rule: '... If the destination of the vessel be neutral, then the destination of the goods on board should be considered neutral, notwithstanding it may appear from the papers or otherwise that the goods themselves have an ulterior hostile destination to be attained by transhipment, overland conveyance, or otherwise.' In a letter to *The Times* of January 2, 1900, Professor Holland points out that circumstances had so altered since 1888 that the attitude of the British Government in the case of the *Bundesrath* was quite justified; see Holland, *Letters to 'The Times' upon War and Neutrality* (3rd ed., 1921), pp. 157-161.

<sup>3</sup> In *The Imina*, 3 C. Rob. 167. It is frequently maintained—see Phillimore, iii. § 227, pp. 397-403—that in 1864, in the case of *Hobbs v.*

*Henning*, 17 C.B. (N.S.) 791, Lord Chief Justice Erle repudiated the doctrine of continuous transportation; but Westlake shows that this is not the case. See Westlake's Introduction in Takahashi, *International Law during the Chino-Japanese War* (1899), pp. xx-xxiii, and in the *Law Quarterly Review*, xv. (1899) pp. 23-30 (now reprinted in Westlake, *Papers*, pp. 461-474). See also Hart, *Law Quarterly Review*, xxiii. (1907) p. 199, who discusses the case of *Seymour v. London and Provincial Marine Insurance Co.* (1872) 41 L.J.C.P. 193, in which the court recognised the doctrine of continuous transportation.

<sup>4</sup> See, e.g., the articles of Mootham and Davies referred to above, p. 676 (n.).

<sup>5</sup> For a survey of authorities see previous edition, § 403.

<sup>6</sup> See Kleen, i. p. 389, n. 2.

<sup>7</sup> See Martens, *N.R.G.*, 2nd ser., xxviii. p. 66, and Diena in 24 *Clunet* (1897), pp. 268-297. See also below, § 436.



neutral French port of Djibouti, carrying a cargo of arms and ammunition destined for the Abyssinian army and to be transported to Abyssinia after having been landed in Djibouti.

The Declaration of London concerning the Doctrine of Continuous Voyage, and the Practice during the World War.

§ 403a. The unratified Declaration of London offered a compromise which, if it had been accepted, would have settled the controversy by applying the doctrines of continuous voyage and continuous transportation to *absolute* contraband, but not, except in cases where the enemy country has no seaboard, to *conditional* contraband.<sup>1</sup>

However, the compromise offered by the Declaration of London was not accepted by the Allies during the World War, and the doctrine of continuous voyage was applied to the circuitous and the indirect carriage of conditional<sup>2</sup> as

<sup>1</sup> Article 30: '*Absolute* contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. *It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land*' (italics the editor's).

Article 35: '*Conditional* contraband is not liable to capture except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port. . . .'

Article 36: 'Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33 [that is, for the use of the armed forces or of a government department of the enemy State], is liable to capture in cases where the enemy country has no seaboard.'

During the Turco-Italian War, Article 35 came into question. In January 1912 the *Carthage*, a French mail-steamer plying between Marseilles and Tunis, was captured for carriage of contraband by an Italian torpedo-boat and taken to Cagliari, because she had an aeroplane destined for Tunis on board. As the destination of the vessel was neutral, and as, according to Article 24 of the Declaration, aeroplanes were conditional contraband, France protested

against the capture of the vessel. Italy agreed to release her, and the question whether her capture was justified was submitted to the Permanent Court of Arbitration at The Hague, which, on May 6, 1913, gave its award in favour of France. See Martens, *N.G.R.*, 3rd ser., viii. p. 174, and above, vol. i. § 151 (n.). See also Rapisardi-Mirabelli in *R.I.*, 2nd ser., xv. (1913) pp. 128-135; Ruzé in *R.I.*, 2nd ser., xvi. (1914) pp. 116-128; Basdevant, *La leçon juridique des incidents du 'Carthage', du 'Manouba', et du 'Tavignano'* (1914).

<sup>2</sup> *The Kim* [1915] P. 215; 1 B. and C.P.C. 405, where Sir Samuel Evans [1915] P. at p. 275; 1 B. and C.P.C. at p. 481, said: 'I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognised legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.' For the later condemnation of the vessel see *The Kim* [1920] P. 319; 3 B. and C.P.C. 685; see also *The Tiber*, Fauchille, *Jur. fr.*, i. 414. See Verzijl, §§ 479-500, and Colombos, §§ 164-166, on the doctrine of continuous voyage during the World War, and Hyde, ii. § 812.

well as of absolute contraband. Thus the British Order in Council of October 29, 1914, which replaced the first Declaration of London Order of August 20, 1914, provided that: 'Notwithstanding the provisions of Article 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port, if the goods are consigned "to order," or if the ship's papers do not show who is the consignee<sup>1</sup> of the goods, or if they show a consignee of the goods in territory belonging to or occupied by the enemy.' By an Order of March 30, 1916, this provision was also made applicable to absolute contraband. The Allies went even beyond this, for the Order of October 29, 1914, laid down the following further rules: 'where it is shown . . . that the enemy Government is drawing supplies for its armed forces from or through a neutral country [it may be directed] that in respect of ships bound for a port in that country, Article 35 of the said Declaration shall not apply . . . so long as such direction is in force, a vessel which is carrying conditional contraband to a port in that country shall not be immune from capture'; and the Order of March 30, 1916, further provided that 'the destinations referred to in Article 30 (absolute contraband) and in Article 33 (conditional contraband) of the said Declaration shall . . . be presumed to exist, if the goods are consigned to or for a person, who, during the present hostilities, has forwarded imported contraband goods to territory belonging to or occupied by the enemy.' In all the cases covered by these provisions of these Orders in Council the burden of proving that the destination of the goods was innocent was laid upon the owner.

However, by the Maritime Rights Order in Council of July 7, 1916, the Declaration of London was abandoned altogether, and it was provided in the simplest terms that 'the principle of continuous voyage or ultimate destination shall be applicable both in cases of contraband and of blockade.' This Order also laid down elaborate presump-

<sup>1</sup> See *The Kronprinzessin Victoria* [1919] A.C. 261; 3 B. and C.P.C. 247; *The Panelinion*, Fauchille, *Jur.*

*fr.*, i. 407; *The Barcelo*, *ibid.*, i. 412. As to the practice of other belligerents see Verzijl, §§ 442-444.

tions as to hostile destination, which have already been mentioned.<sup>1</sup>

### III

#### CONSEQUENCES OF CARRIAGE OF CONTRABAND

See the literature quoted above at the commencement of § 391, and, for the provisions of a number of prize codes and the practice during the World War, Verzijl, §§ 518-526—Garner, *Prize Law*, Nos. 425-441—Keith's Wheaton, pp. 1069-1075, and the judgment of Sir Samuel Evans, P., in *The Hakan* [1916] P. 266, 2 B. and C.P.C. 210; affirmed [1918] A.C. 148, 2 B. and C.P.C. 479.

Capture  
for Car-  
riage of  
Contra-  
band.

§ 404. It has always been universally recognised by theory and practice that a vessel<sup>2</sup> carrying contraband may be seized by the cruisers of the belligerent concerned. But seizure is allowed only so long as a vessel is *in delicto*; this commences when she leaves the port of starting, and ends when she has deposited the contraband goods, whether with the enemy or otherwise. The rule was generally recognised, therefore, even prior to the Declaration of London, that a vessel which had deposited her contraband may not be seized on her return voyage. British and American practice has indeed admitted one exception to this rule—namely, in the case in which a vessel had carried contraband on her outward voyage with simulated and false papers.<sup>3</sup> But no

<sup>1</sup> Above, § 395. Certain new applications of the doctrine of continuous transportation or indirect carriage of contraband were made by the British Prize Courts during the World War. Thus, in 1917, it was decided (*The Balto* [1917] P. 79; 2 B. and C.P.C. 398; see also two decisions in the German Prize Courts to the same effect: *The Norden, Entscheidungen*, ii. 35, and *The Atlas, ibid.*, ii. 321) that the doctrine of continuous transportation was applicable even in a case where contraband goods, seized while on their way to a neutral country, had been intended, after having undergone a process of manufacture there, to be exported from the neutral to an enemy country. But the British Prize Court (*The Bonna* [1918] P. 123; 3 B. and C.P.C. 163) expressed the view that it would not be in accordance with International Law 'to hold that raw materials on

their way to citizens of a neutral country to be converted into a manufactured article for consumption in that country were subject to condemnation on the ground that the consequence might, or even would necessarily, be that another article of a like kind and adapted for a like use would be exported by other citizens of the neutral country to the enemy.'

<sup>2</sup> Spaight, *Air*, p. 394, anticipates that the prize courts which will deal with questions of contraband by aircraft will in general apply the rules applicable to maritime contraband.

<sup>3</sup> *The Nancy* (1800) 3 C. Rob. 122; *The Margaret* (1810) 1 Acton 333. See Holland, *Prize Law*, § 80. Wheaton, i. § 506, n. b, condemns this practice; Hall, § 247, calls it 'undoubtedly severe'; Halleck, ii. p. 248, defends it. See also Calvo, v. §§ 2756-2758.

such exception has been admitted by the practice of other countries.<sup>1</sup> Seizure for carriage of contraband is only admissible on the open sea and in the maritime territorial belts of the belligerents. Seizure within the maritime belt of neutrals would be a violation of neutrality.<sup>2</sup>

§ 405. In former times neither in theory nor in practice was there agreement upon the rules governing the penalty for carriage of contraband. The penalty was frequently confiscation not only of the contraband cargo itself, but also of all other parts of the cargo, together with the vessel. Only France made an exception, since, according to an *ordonnance* of 1584, she did not even confiscate the contraband goods themselves, but only seized them against payment of their value; it was not until 1681 that an *ordonnance* proclaimed confiscation of contraband, and even then with exclusion of the vessel and the innocent part of the cargo.<sup>3</sup> During the seventeenth century, however, the distinction between contraband on the one hand, and the innocent goods and the vessel on the other, was clearly recognised

Penalty for Carriage of Contraband according to the Practice hitherto prevailing.

<sup>1</sup> Thus, when in 1879, during war between Peru and Chile, the German vessel *Luzor*, after having carried a cargo of arms and ammunition from Monte Video to Valparaiso, was seized in the harbour of Callao, in Peru, and condemned by the Peruvian Prize Courts for carrying contraband, Germany interfered, and succeeded in getting the vessel released.

<sup>2</sup> Article 37 of the unratified Declaration of London confirmed these old customary rules by providing that a vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage even if she is to touch at a port of call before reaching the hostile destination. But Article 38 rejected the British and American practice by providing that a vessel might not be captured on the ground that she had carried contraband (see below, § 428a) on a previous occasion if it was in point of fact at an end.

During the World War, however, the Allies adopted Article 37, but

did not adopt Article 38. Thus the British Order in Council of October 29, 1914, which replaced the Order of August 20, 1914, provided that 'a neutral vessel with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage'; and this rule was re-enacted in the Maritime Rights Order in Council of July 7, 1916, by which the Declaration was abandoned. (In *The Alwina* [1918] A.C. 444; 3 B. and C.P.C. 54, it was held, upon the Orders in Council of August 20 and October 29, 1914, that a neutral vessel which had been carrying contraband with false papers is not liable to capture if in the meantime she had abandoned the adventure, discharged the contraband cargo at a neutral port, and sold and delivered it to other buyers.)

<sup>3</sup> See Wheaton, *Histoire des progrès du droit des gens en Europe* (1841), p. 82.

by Zouche and Bynkershoek, and confiscation of the contraband alone became more and more the rule, certain cases excepted. During the eighteenth century the right to confiscate contraband was frequently contested, and it is remarkable as regards the change of attitude of some States that by Article 13 of the Treaty of Friendship and Commerce<sup>1</sup> concluded in 1785 between Prussia and the United States of America all confiscation was abolished. This article provided that the belligerent should have the right to stop vessels carrying contraband, and to detain them for such length of time as might be necessary to prevent possible damage by them, but that compensation should be paid for their detention. It further provided that the belligerent might seize all contraband against payment of its full value, and that, if the captain of a vessel stopped for carrying contraband delivered up all contraband, the vessel should at once be set free. It is doubtful whether any other treaty of the same kind was entered into by either Prussia or the United States<sup>2</sup>; and it is certain that, if any rule regarding the penalty for the carriage of contraband was generally recognised at all, it was the rule that contraband goods could be confiscated. But there always remained the difficulty that the question what articles were contraband was controversial, and that the practice of States varied much on the point whether the vessel herself and innocent cargo carried by her could be confiscated. For beyond the rule that absolute contraband could be confiscated, there was no unanimity regarding the fate of the vessel and the innocent part of the cargo. Great Britain and the United

<sup>1</sup> Martens, *R.*, iv. p. 42. The stipulation was renewed by Article 13 of the Treaty of Friendship and Commerce of 1799, and by Article 12 of the Treaty of Commerce and Navigation concluded between the two States in 1828: Martens, *R.*, vi. p. 679, and *N.R.*, vii. p. 619. These treaties were the subject of diplomatic correspondence between the United States and Germany during the World War, Germany having sunk a neutral American vessel, the *William P. Frye* (see above, § 395 (n.)), which was carrying

contraband. See *A.J.*, ix. (1915), Special Suppl., pp. 180-193, and x. (1916), Special Suppl., pp. 345-352; *Z.I.*, xxvi. (1915) pp. 184-197; Hyde, ii. § 758.

<sup>2</sup> Article 12 of the Treaty of Commerce between the United States of America and Italy, signed at Florence on February 20, 1871—see Martens, *N.R.G.*, 2nd ser., i. p. 57—stipulates immunity from seizure of such private property only as does not consist of contraband or is involved in an attempt to break blockade. See above, § 178.

States of America confiscated the vessel when the owner of the contraband was also the owner of the vessel; they also confiscated such part of the innocent cargo as belonged to the owner of the contraband goods<sup>1</sup>; they, lastly, confiscated the vessel, although her owner was not the owner of the contraband, if the vessel sailed with false papers for the purpose of carrying contraband,<sup>2</sup> or if the vessel was by a treaty with her flag State under an obligation not to carry the goods concerned to the enemy and the owner knew that his vessel was carrying contraband.<sup>3</sup> To these—as appears from *The Hakan*,<sup>4</sup> decided in the British Prize Courts during the World War—British practice added a third case. After considering the practice of the past, the Privy Council felt that ‘in this state of the authorities they ought to hold that knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship, at any rate where the goods in question constitute a substantial part of the whole cargo.’

Some States allowed a vessel carrying contraband which was not herself liable to confiscation to proceed with her voyage on delivery of her contraband goods to the capturing cruiser,<sup>5</sup> but Great Britain<sup>6</sup> and other States insisted upon the vessel being brought before a Prize Court in every case.

As regards conditional contraband, those States which made any distinction at all between absolute and conditional contraband frequently confiscated neither the conditional contraband nor the carrying vessel, but seized the former

<sup>1</sup> *The Kronprinsessan Margareta*; *The Parana* [1921] 1 A.C. 486; 3 B. and C.P.C. 803; *The Annie Johnson* [1918] P. 155; 3 B. and C.P.C. 138; *The Posteiro* (1917) 3 B. and C.P.C. 275; *The Antwerpen* [1919] P. 252 (n.); 3 B. and C.P.C. 486 (n.); see also *The Oscar II.* in *R.G.*, xxvii. (1920), *Jurisprudence*, p. 85; and German cases in *Verzijl*, § 507. On the so-called theory of infection see Colombos, §§ 184-185.

<sup>2</sup> See Holland, *Prize Law*, §§ 82-87.

<sup>3</sup> *The Neutralitet* (1801) 3 C. Rob. 295; *The Ringende Jacob* (1798) 1 C. Rob. 89; *The Sarah Christina* (1799) 1 C. Rob. 237; *The Franklin* (1801) 3 C. Rob. 217.

<sup>4</sup> [1918] A.C. 148, 156; 2 B. and C.P.C. 479, 487. This principle was followed and extended in the case of *The Kim*; *The Björnsterne Björnson*; *The Alfred Nobel* [1920] P. 319; 3 B. and C.P.C. 685, where the vessels, which were condemned, were under time charter, and knowledge of the contraband transaction could only be imputed to the charterers and to the masters. See also *The Dirigo* [1919] P. 204; 3 B. and C.P.C. 439; *The Ran* [1919] P. 317; 3 B. and C.P.C. 621; *The Zamora* (No. 2) [1921] 1 A.C. 801; 3 B. and C.P.C. 919.

<sup>5</sup> See Calvo, v. § 2779.

<sup>6</sup> See Holland, *Prize Law*, § 81.

and paid for it. According to the former British practice<sup>1</sup> which prevailed in such cases of pre-emption, freight was paid to the vessel, and the usual compensation for the conditional contraband was the cost price plus ten per cent. profit. States acting in this way asserted a right to confiscate conditional contraband, but exercised pre-emption in mitigation of such a right. Those Continental writers who refused to recognise the existence of conditional contraband denied in consequence that there was a right to confiscate articles which were not absolute contraband; but they maintained that every belligerent had, according to the so-called right of angary,<sup>2</sup> a right to stop all neutral vessels carrying provisions and other goods with a hostile destination of which he might have made use, and to seize such goods against payment of their full value.

The British practice with regard to payment of freight is that as a general rule the neutral shipowner is not entitled to freight in respect of contraband cargo carried by him, but that nevertheless the Prize Court has in very exceptional cases a discretion to award freight to a neutral shipowner; but his innocence of complicity in a contraband transaction cannot in itself be regarded as entitling him to freight.<sup>3</sup>

<sup>1</sup> See Holland, *Prize Law*, § 84. Great Britain likewise exercised pre-emption instead of confiscation with regard to such absolute contraband as was in an unmanufactured condition and was at the same time the produce of the country exporting it.

<sup>2</sup> See above, § 365.

<sup>3</sup> *The Neptunus* (1800) 3 C. Rob. 108; *The Jeanne* [1917] P. 8; 2 B. and C.P.C. 300; *The Prins der Nederlanden* [1921] 1 A.C. 754; 3 B. and C.P.C. 943. The rule is believed to be the same, whether the contraband is conditional or absolute. For American decisions see *The Commercen* (1816) 1 Wheat. 382; *The Peterhoff* (1866) 5 Wall. 28. For a review of the cases, old and recent, see Roscoe in *Law Quarterly Review*, xxxviii. (1922) pp. 350-358. As to freight generally see Colombos, §§ 256-262. See also Baty, pp. 334-337.

There are cases in which a neutral

shipowner has claimed an indemnity for the loss arising from the detention of his ship against the owner of cargo which was suspected of being contraband and thus brought about the detention of the ship; but at any rate, when the cargo is released and the cargo-owner has concealed no material fact from the shipowner and done nothing to increase the risk of the voyage, no compensation will be awarded to the shipowner against the cargo-owner or his cargo; the loss is an incident of belligerency and must lie where it falls (*The Einar Jarl* [1920] P. 64 (n.); 3 B. and C.P.C. 547 (n.); *The Donald* [1920] P. 56; 3 B. and C.P.C. 539. For a similar point in the case of goods detained under the Reprisals Orders see *The Rio de Janeiro* [1919] P. 242 (n.); 3 B. and C.P.C. 464 (n.); *The Heim* [1919] P. 237; 3 B. and C.P.C. 459. And see Garner, *Prize Law*, Nos. 468, 469, on French and German decisions.

§ 406. The unratified Declaration of London offered by Articles 39 to 44 a settlement of the controversy respecting the penalty for carriage of contraband which represented a fair compromise. Contraband goods, whether absolute or conditional contraband, might be confiscated (Article 39). The carrying vessel might (Article 40) likewise be confiscated if the contraband, reckoned either by value, weight, volume, or freight, formed more than half the cargo.<sup>1</sup> If this was not the case, and the carrying vessel was therefore released, she might (Article 41) be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national Prize Court and the custody of the ship and cargo during the proceedings. But whatever might be the proportion between contraband and innocent goods on a vessel, innocent goods (Article 42) which belonged to the owner of the contraband and were on board the same carrying vessel might be confiscated.

Penalty for Carriage of Contraband according to the Declaration of London.

If a vessel carrying contraband sailed before the outbreak of war (Article 43), or was unaware of a declaration of contraband which applied to her cargo, or had had no opportunity of discharging her cargo after receiving such knowledge,<sup>2</sup> the contraband might only be confiscated on payment of compensation,<sup>3</sup> and the vessel herself and her innocent cargo

<sup>1</sup> In *The Lorenzo* (St. Lucia Prize Court) (1914) 1 B. and C.P.C. 226, it was correctly decided that under Article 40 of the Declaration of London the confiscation of the carrying vessel takes place whether or not her owner knew that she was carrying contraband; see also the German case of *The Midland* in Fauchille, *Jur. all.*, 249. In *The Hakan* (see above, § 405), it was held that knowledge on the part of the owner of the vessel that a substantial part of the cargo is contraband is in itself sufficient to justify her condemnation. It was also held in this case in the court of first instance, and in *The Maracaibo* [1916] P. 266; 2 B. and C.P.C. 294, that, independently of the Declaration of London, it is now a rule of International Law that the carrying vessel may be condemned if the contraband, reckoned either by value, weight, volume, or

freight, forms more than half the cargo. It was further held in *The Maracaibo*, that this rule applies even when the owner of the vessel is ignorant of the contraband character of the goods. But doubts were expressed on this point in *The Dirigo* [1919] P. 204; 3 B. and C.P.C. 439. See also *The Hillerod* (1917) 3 B. and C.P.C. 48; *The Ran* [1919] P. 317; 3 B. and C.P.C. 621; *The Kim* [1920] P. 319; 3 B. and C.P.C. 685. And see *The Berkelstroom*, *Entscheidungen*, i. 318.

<sup>2</sup> It seems to be obvious that Article 43 only applies to cargo which is neutral property. If enemy property, it may be condemned without compensation. See *The Sorfaren* (1915) 1 B. and C.P.C. 580.

<sup>3</sup> It is obvious that the vessel must be brought into a port and before a Prize Court if the captor desires to seize the contraband against com-



might not be confiscated, nor might the vessel be condemned to pay any costs and expenses incurred by the captor. But there was to be a presumption which was not to be rebuttable with regard to the *mens rea*<sup>1</sup> of the vessel. For according to the second paragraph of Article 43, a vessel was to be considered to have knowledge of the outbreak of war, or of a declaration of contraband, if she left an enemy port after the outbreak of hostilities, or if she left a neutral port after the notification of the outbreak of hostilities, or of the declaration of contraband to the Power to which such port belonged, provided that such notification was made in sufficient time.<sup>2</sup> However, the Declaration did not secure ratification.

The question of pre-emption of conditional contraband was not mentioned in the Declaration. There is, however, nothing to prevent the several maritime Powers from exercising pre-emption in mitigation of their right of confiscation.

Seizure of  
Contra-  
band  
without  
Seizure  
of the  
Vessel.

§ 406a. Prior to the Declaration of London, the practice of the several States had differed<sup>3</sup> with regard to the question whether a vessel which was not herself liable to condemnation might be allowed to proceed on her voyage, on condition that she handed over the contraband carried by her to the captor. Great Britain and some other States answered it in the negative; but several States in the affirmative. The unratified Declaration of London, although it upheld the general rule that, whatever might be the ultimate fate of the vessel, she must be taken into a port of a Prize Court, admitted two exceptional cases, where the contraband cargo could be removed by the captor

penetration. The question whether Article 44 applied to such a case, and whether therefore the neutral vessel might be allowed to continue her voyage if the master was willing to hand over the contraband to the captor, must be answered in the affirmative, provided that the contraband, reckoned either by value, weight, volume, or freight, formed less than half the cargo. For Article 44 precisely treated of a case in which the vessel herself was not

liable to condemnation *on account of the proportion of the contraband on board* (see Article 40).

<sup>1</sup> On the question of *mens rea* in Prize Law generally see Lord Merri- vale (Sir Henry Duke) in *Grotius Society*, vi. (1921) pp. 99-106.

<sup>2</sup> See *The Kronprins Gustaf* [1919] P. 182; 3 B. and C.P.C. 432.

<sup>3</sup> See above, § 405.

from the vessel, which would thereupon continue her voyage.<sup>1</sup>

During the earlier part of the World War the Allies adopted the rules of the unratified Declaration which have been mentioned in this and the preceding section ; when, in July 1916, Great Britain and France abandoned the Declaration altogether, they expressly retained Article 40.

<sup>1</sup> (1) According to Article 44, a vessel which had been stopped for carrying contraband, and which was not herself liable to be confiscated on account of the proportion of contraband on board, might—not must—when the circumstances permitted it, be allowed to continue her voyage upon handing over the contraband cargo to the captor. Thereupon the captor was to be at liberty to destroy the contraband handed over to him. But the matter had in any case to be brought before a Prize Court. The captor had therefore to enter the delivery of the contraband in the log-book of the vessel so stopped, and the master had to give duly certified copies of all relevant papers to the captor.

(2) According to Article 54, the captor might (see below, § 431) exceptionally, in case of necessity, demand the handing over, or might

proceed himself to the destruction, of any absolute or conditional contraband goods found on a vessel which was not herself liable to condemnation, if the taking of the vessel into the port of a Prize Court would involve danger to the safety of the capturing cruiser, or to the success of the operations in which she was engaged at the time. But the captor had nevertheless to bring the case before a Prize Court. He had, therefore, to enter the captured goods in the log-book of the stopped vessel, and obtain duly certified copies of all relevant papers. If the captor could not establish before the Prize Court that he was really compelled to abandon the intention of bringing in the carrying vessel, he was to be condemned (see Article 51) to pay the value of the goods to their owners whether contraband or not.

# CHAPTER V

## UNNEUTRAL SERVICE

### I

#### THE DIFFERENT KINDS OF UNNEUTRAL SERVICE

Hall, §§ 248-253—Lawrence, §§ 260-262—Westlake, ii. pp. 302-306—Phillimore, iii. §§ 271-274—Halleck, ii. pp. 305-344—Taylor, §§ 667-673—Walker, § 72—Wharton, iii. § 374—Wheaton, §§ 502-504 and Dana's note 228—Moore, vii. §§ 1264-1265—Hershey, Nos. 513-515—Bluntschli, §§ 815-818—Heffter, § 161a—Geffcken in *Holtzendorff*, iv. pp. 731-738—Ullmann, § 192—Fauchille, §§ 1584-1588, 1588 (15)-1588 (16), 1588 (77)-1588 (79)—Despaget, Nos. 716-716 bis—Rivier, ii. pp. 388-391—Nys, iii. pp. 671-678—Calvo, v. §§ 2796-2820—Fiore, iii. Nos. 1602-1605, and *Code*, Nos. 1859-1863—Martens, ii. § 136—Kleen, i. §§ 103-106—Boeck, Nos. 660-669—Pillet, pp. 330-332—Gessner, pp. 99-111—Perels, § 47—Testa, p. 212—Dupuis, Nos. 231-238, and *Guerre*, Nos. 172-188—Bernsten, § 9—Nippold, ii. § 35—Schramm, § 11—Holland, *Prize Law*, §§ 88-105—U.S. Naval War Code, Articles 16 and 20—Hautefeuille, ii. pp. 173-188—Ortolan, ii. pp. 209-213—Hyde, ii. §§ 817-823—Rolin, §§ 1247-1271—Verzijl, §§ 546-552—Hatschek, pp. 353-359—Kunz, pp. 290-297—Spaight, *Air*, pp. 389-393—Bernard, *Neutrality of Great Britain during the American Civil War* (1870), pp. 187-225—Marquardsen, *Der Trent-Fall* (1862), pp. 58-71—Hirsch, *Kriegs-konterbande und verbotene Transporte in Kriegszeiten* (1897), pp. 42-55—Takahashi, *International Law during the Chino-Japanese War* (1899), pp. 52-72—Vetzel, *De la contrebande par analogie en droit maritime internationale* (1901)—Atherley-Jones, *Commerce in War* (1907), pp. 304-315—Hirschmann, *Das internationale Prisenrecht* (1912), §§ 31-32—Pastureau, *Des transports interdits aux neutres* (1912)—Le Jemtel, *L'assistance hostile dans les guerres maritimes modernes* (1938)—Wehberg, pp. 123, 132—Garner, ii. §§ 538-545, and *Prize Law*, Nos. 446-450—Keith's Wheaton, pp. 1076-1089—Colombos, §§ 189-198—Lord Merrivale (Sir Henry Duke) in *Grotius Society*, vi. (1921) pp. 99-106—Hill in *A.J.*, xxiii. (1929) pp. 56-67—*Harvard Research* (1939), pp. 654-674. See also many of the monographs quoted above at the commencement of § 391, and the General Report presented to the International Naval Conference of London on behalf of the Drafting Committee, Articles 46-47, Cmd. 4554, p. 55.

Un-  
neutral  
Service in  
general.

§ 407. Before the Naval Conference of London held in 1908, the term *unneutral service* had been used by several writers with reference to the carriage by neutral vessels of

certain persons and despatches for the enemy. The term had been introduced to distinguish such carriage of persons and despatches from the carriage of contraband, with which it was often confused. Since contraband consists of certain goods only, and never of persons or despatches, a vessel carrying persons and despatches for the enemy does not carry contraband<sup>1</sup>; and there is another important difference. Carriage of contraband need not necessarily, and in most cases in practice does not, take place in the direct service of the enemy. On the other hand, carriage of persons and despatches for the enemy usually does take place in the direct service of the enemy, and, consequently, represents much more intensive assistance to him, and a much more intimate connection with him, than carriage of contraband. For these reasons, separate treatment for carriage of contraband and for carriage of persons and despatches was certainly considered desirable by many writers. Those among them who did not adopt the term *unneutral service*, on account of its somewhat misleading character, preferred<sup>2</sup> the expression *analogues of contraband*, because in practice maritime transport for the enemy was always treated as analogous to, although not as identical with, carriage of contraband.<sup>3</sup>

The unratified Declaration of London sought to place the whole matter upon a new and very much enlarged basis, for Articles 45 to 47 treated, under the heading *De l'assistance hostile*—the official English translation of which was *unneutral service*—not only of carriage of persons for the enemy by a neutral vessel, but also of transmission of intelligence in his interest, of taking a direct part in the hostilities, and of a number of other acts. The unratified Declaration made a broad distinction between two kinds of unneutral service: meting out, for the one, treatment analogous in a general

<sup>1</sup> This was recognised in *The Yangtze Insurance Association v. Indemnity Mutual Marine Assurance Company* [1908] 1 K.B. 910; [1908] 2 K.B. 504.

<sup>2</sup> It was also preferred in the first edition of this work. But after the official adoption, in the translation of the unratified Declaration of

London, of the term *unneutral service*, it was useless to oppose it.

<sup>3</sup> Although—see above, §§ 173-174—prevention of unneutral service to the enemy is a means of sea warfare, it chiefly concerns neutral commerce, and is therefore more conveniently treated with neutrality.

way to the treatment of contraband; and, for the other, treatment analogous to that of enemy merchant-vessels. Carriage of individual members of the armed forces of the enemy, and a certain case of transmission of intelligence in the interest of the enemy, constituted the first kind; and four groups of acts bestowing enemy character on the vessel concerned constituted the second kind.

At the outbreak of the World War the Allies adopted the rules relating to unneutral service contained in the unratified Declaration of London, and applied them (subject to reprisals<sup>1</sup>) without modification until the whole Declaration was abandoned in July 1916. Thereafter the customary rules prevailing before the Naval Conference of London again became applicable.<sup>2</sup> After that date, however, few (if any) cases of unneutral service came before the Prize Courts in which general principles were laid down or applied; and as conditions have changed greatly since the old customary rules grew up, the present position of the law of unneutral service is unsatisfactory.

Carriage  
of Persons  
for the  
Enemy.

§ 408. A belligerent may punish neutral vessels for carrying, in the service of the enemy, certain persons.

Such persons included, according to the customary rules of International Law prevailing before the unratified Declaration of London, not only (a) members of the armed forces of the enemy, but also (b) individuals who, though not yet members of the armed forces, would have become so as soon as they reached their place of destination, and (c) non-military individuals in the service of the enemy who were either in such a prominent position that they could be made prisoners of war, or were going abroad as agents for the purpose of fostering the cause of the enemy. Thus, for instance, if the head of the enemy State, or one of his cabinet ministers, fled the country to avoid captivity, the neutral vessel that carried him could have been punished, as could also the vessel carrying an agent of the enemy sent abroad to negotiate a loan and the like. However, the mere fact that enemy persons were on board a neutral vessel did not in itself prove that they were carried by the vessel

<sup>1</sup> See below, § 413a.

<sup>2</sup> See above, § 292.

for the enemy, and in his service. This was the case only when those in charge of the vessel knew of the character of the persons and nevertheless carried them, thereby acting in the service of the enemy, or when the vessel was directly hired by the enemy for the purpose of transporting the individuals concerned. Thus, for instance, if able-bodied men booked their passages on a neutral vessel to an enemy port with the secret intention of enlisting in the forces of the enemy, the vessel could not be considered as carrying persons for the enemy; but she could be so considered, if an agent of the enemy openly booked their passages. As regards a vessel directly hired by the enemy, there could be no doubt that she was acting in the service of the enemy.<sup>1</sup>

According to British practice prevailing before the unratified Declaration of London, a neutral vessel was considered as carrying persons in the service of the enemy even if she had been forcibly constrained by the enemy to carry them, or if she was *bona fide* in ignorance of the status of her passengers.<sup>2</sup>

<sup>1</sup> Thus the American vessel *Orozembo* (6 C. Rob. 430) was in 1807, during war between Great Britain and the Netherlands, captured and condemned because, although chartered by a merchant in Lisbon ostensibly to sail in ballast to Macao and to take from there a cargo to America, she received, by order of the charterer, three Dutch officers and two Dutch civil servants, and sailed, not to Macao, but to Batavia. The American vessel *Friendship* (6 C. Rob. 420) was likewise in 1807, during war between Great Britain and France, captured and condemned, because she was hired by the French Government to carry ninety shipwrecked officers and sailors home to a French port.

<sup>2</sup> Thus, in 1802, during war between Great Britain and France, the Swedish vessel *Carolina* (4 C. Rob. 256) was condemned by Sir William Scott for having carried French troops from Egypt to Italy, although the master endeavoured to prove that the vessel was forced to render the transport service; and the American vessel *Orozembo* (see above, p. 693 (n.)), Philli-

more, iii. § 274, and Holland, *Prize Law*, §§ 90-91) was condemned during war between Great Britain and the Netherlands, although her master was ignorant of the service for the enemy on which he was engaged: '... In cases of *bona fide* ignorance there may be no actual delinquency; but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done or at least repeated,' said Sir William Scott. Hall, § 249 (n.), reprobates the British practice. Compulsion of the vessel was held not to be a defence in the German case of *The Island, Entscheidungen*, ii. 8, and the Roumanian case of *The Nicolae*, in Verzijl, § 560. During the Russo-Japanese War only one case of condemnation of a neutral vessel for carrying persons for the enemy is recorded, that of the *Nigretia*, a vessel which endeavoured to carry into Vladivostok the escaped captain and lieutenant of the Russian destroyer *Ratstoropny*; see Takahashi, pp. 639-641, and Hurst, ii. p. 201.

It should be mentioned that, ac-

When the vessel is also carrying cargo, and the owner of the cargo participates or connives in the unneutral service, the cargo also is liable to condemnation.<sup>1</sup>

According to the unratified Declaration of London, neutral merchantmen (apart from the case of the carriage of persons who in the course of the voyage directly assist the operations of the enemy) might only be considered to

cording to the customary law hitherto prevailing, the case of diplomatic agents sent by the enemy to neutral States was an exception to the rule that neutral vessels may be punished for carrying agents sent by the enemy. The importance of this exception became apparent in the case of the *Trent*, which occurred during the American Civil War. On November 8, 1861, the Federal cruiser *San Jacinto* stopped the British mail steamer *Trent* on her voyage from Havana to the British port of Nassau, in the Bahamas, forcibly took off Messrs. Mason and Slidell, together with their secretaries, political agents sent by the Confederate States to Great Britain and France, and then let the vessel continue her voyage. Great Britain demanded their immediate release, and the United States at once granted this, although the ground on which release was granted was not identical with the ground on which it was demanded. The United States, contending that these men were contraband of war, maintained that their removal from the vessel without bringing her before a Prize Court for trial was irregular, and therefore not justified; whereas release was demanded on the ground that a neutral vessel could not be prevented from carrying diplomatic agents sent by the enemy to neutrals. Now, diplomatic agents in the proper sense of the term these gentlemen were not, because, although they were sent by the Confederate States, the latter were not recognised as such, but only as a belligerent Power. Yet they were political agents of a quasi-diplomatic character, and the standpoint of Great Britain was for this reason perhaps correct; at any rate, they were not contraband. The fact that the Governments of France, Austria, and Prussia protested through their diplo-

matic envoys in Washington shows at least that neutral vessels may carry unhindered on the open sea (though not through the territorial waters of the other belligerent—see above, vol. i. § 398, and the cases of *Tarnowski*, *Dumba*, and *Bernstorff* there mentioned) diplomatic agents sent by the enemy to neutrals, however doubtful it may be whether the same applies to agents with a quasi-diplomatic character. In December 1939, Mr. Vereker, counsellor of the British Embassy in Moscow, was taken off an Estonian vessel by a German cruiser in the Upper Baltic when on his way to London en route to his new post as Minister to Bolivia. He was released shortly afterwards following upon representations made by the United States. On the *Trent* case see Parl. Papers (1862), North America, No. 5; Marquardsen, *Der Trent-Fall* (1862); Wharton, iii. § 374; Moore, vii. § 1265; Phillimore, ii. §§ 130-130a; *Letters by Historicus* (1863), pp. 185-198; Bernard, *Neutrality of Great Britain during the American Civil War* (1870), pp. 187-225; Harris, *The Trent Affair* (1896); Hyde, ii. §§ 818-820; Malkin, *The Trent and the China*, in *B.Y.*, 1924, pp. 66-77; *Harvard Research* (1939), pp. 606, 607. But see *The Pontoporeos* (1915) 1 B. and C.P.C. 371; (1916) 2 B. and C.P.C. 87, where this and other cases were considered; compare also *The Smithiad* [1920] A.C. 718; 3 B. and C.P.C. 574. For a case of search in the belligerent's own territorial waters with a view to the removal of a person bringing to the enemy a warlike invention see the case of the *Gaelic* in the Sino-Japanese War in 1894 (mentioned by Bate in *A Century of Law Reform* (1901), pp. 86-87).

<sup>1</sup> *The Greta* (1855), in *B.Y.*, 1922-1923, pp. 188-193.

render unneutral service if they carried such enemy persons as were already actually members of the armed forces of the enemy. Article 45 made it clear, by using the words 'embodied in the armed forces' (*incorporés dans la force armée*), that reservists and the like who were on their way to the enemy country for the purpose of there joining the armed forces, were not <sup>1</sup> among the classes of enemy persons which a neutral vessel might not carry without exposing herself to punishment for rendering unneutral service to the enemy.

Four different cases of carrying members of the armed forces of the enemy were distinguished by the unratified Declaration, namely :

(1) According to Article 46 (4), a neutral vessel exclusively appropriated at the time to the transport of enemy troops acquired thereby enemy character. This case will be considered with others of the same kind below.<sup>2</sup>

(2) According to Article 45 (2), a vessel, not exclusively appropriated to that work, and not on a voyage specially undertaken for that purpose, which transported, to the knowledge of either the owner or the charterer or the master, a military detachment of the enemy, was to be considered to render unneutral service for which she might be punished. Accordingly, if to the knowledge of either the owner or the charterer or the master, a neutral vessel *in the ordinary course of her voyage* carried a military detachment of the enemy, she was to be liable to be seized for unneutral service.

(3) According to Article 45 (2), a neutral vessel which, to the knowledge of either the owner or the charterer or the master, carried one or more persons—whether belligerent or neutral subjects—who in the course of the voyage directly assisted <sup>3</sup> the operations of the enemy in any way, for

<sup>1</sup> But see the French case of *The Federico* (1915)—Garner, ii. § 544; text in *R.G.*, xxii. (1915), *Jurisprudence*, p. 17, xxiv. (1917), *Jurisprudence*, p. 11—in which the Prize Court of Appeal, in direct opposition to the Renault Report on the Declaration of London, decided that reservists on their way home from abroad are considered to be 'incor-

porated' in the army of their home State.

<sup>2</sup> § 410.

<sup>3</sup> Presumably this means that the owner or charterer or master must be aware not merely of the carriage of a person who happens to render assistance to the enemy, but of the fact that he does render such assistance during the voyage.



instance by signalling or sending a message by wireless telegraphy, was to be likewise liable to seizure for rendering unneutral service.

(4) According to Article 45 (1), a neutral vessel which carried individual passengers who are embodied in the armed forces of the enemy, was only to be liable to seizure if she was on a voyage specially undertaken for such transport; for instance, if she had been diverted from her ordinary course and had touched at a port outside her ordinary course for the purpose of embarking, or was going to touch at a port outside her ordinary course for the purpose of disembarking, the enemy persons concerned. A liner, therefore, carrying individual members of the armed forces of the enemy in the ordinary course of her voyage might not be considered to be rendering unneutral service and might not be seized. However, according to Article 47, a neutral vessel carrying members of the armed forces of the enemy while pursuing her ordinary course, might be stopped for the purpose of taking off such enemy persons and making them prisoners of war.<sup>1</sup>

But the rules formulated by the Declaration of London are not binding, and the former customary rules remain applicable.

Trans-  
mission of  
Intelli-  
gence to  
the  
Enemy.

§ 409. A belligerent may punish neutral merchantmen for transmission of intelligence to the enemy.

According to customary rules of International Law, a belligerent may punish neutral vessels for the carriage of political despatches from or to the enemy, and especially such despatches as relate to the war.<sup>2</sup> But to this rule there have been two exceptions. First, as neutrals have a right to demand that their intercourse with either belligerent be not suppressed, a neutral vessel might not, according to the old cases, be punished for carrying despatches from the enemy to neutral Governments, and *vice versa*,<sup>3</sup> or from the enemy Government to its diplomatic agents and consuls

<sup>1</sup> See below, § 413.

<sup>2</sup> See *The Lief Gundersen* (1918) in the French Prize Court: *Journal Officiel*, January 18, 1919, p. 709; Scott, *Cases*, p. 888. For an instance

of the condemnation of a vessel belonging to an ally see the *Iro-Maru*, below, § 409 (n.).

<sup>3</sup> *The Caroline* (1808) 6 C. Rob. 461.

abroad in neutral States, and *vice versa*.<sup>1</sup> The second exception was created by Article 1 of Hague Convention XI. relative to postal correspondence,<sup>2</sup> which provides that postal correspondence, whether private or official, is inviolable. However, the mere fact that a neutral vessel has political despatches to or from the enemy on board does not by itself prove that she is carrying them *for and in the service of the enemy*. Just as in the case of certain enemy persons on board, so in the case of despatches, the vessel is only considered to be carrying them in the service of the enemy if she knows of their character and has nevertheless taken them on board, or if she is directly hired for the purpose of carrying them. Thus, the American vessel *Rapid*,<sup>3</sup> which was captured during the war between Great Britain and the Netherlands, on her voyage from New York to Tonningen, for having on board a despatch for a cabinet minister of the Netherlands hidden under a cover addressed to a merchant at Tonningen, was released by the Prize Court. On the other hand, the *Atalanta*,<sup>4</sup> which carried despatches in a tea-chest hidden in the trunk of a supercargo, was condemned.<sup>5</sup>

The Declaration of London prescribes rules upon the transmission of intelligence to the enemy, but, as it has not been ratified, the old customary rules remain applicable.<sup>6</sup>

<sup>1</sup> *The Madison* (1810) Edwards 224.

<sup>2</sup> As to which see above, § 191.

<sup>3</sup> (1810) Edwards 228.

<sup>4</sup> (1808) 6 C. Rob. 440.

<sup>5</sup> British practice seems unsettled on the question whether the vessel must know of the character of the despatch which she is carrying. In spite of the case of the *Rapid*, quoted above, Holland, *Prize Law*, § 100, maintains that ignorance of the master of the vessel is no excuse, and Phillimore, iii. § 272, seems to be of the same opinion. The same view was adopted by the Supreme Court of New South Wales in *The Zambesi* (1914) 1 B. and C.P.C. 358. See Colombos, § 190.

<sup>6</sup> According to the unratified Declaration of London, the carriage of despatches for the enemy might only be punished in case it fell

under the category of transmitting intelligence to the enemy on the part of a neutral vessel. Two kinds of such transmission of intelligence had to be distinguished:

First, according to Article 46(4), a neutral vessel exclusively intended for the transmission of intelligence to the enemy acquired thereby enemy character; this will be considered with other cases of the same kind below, § 410.

Secondly, according to Article 45 (1), a neutral vessel might be seized for transmitting intelligence to the enemy if she was on a voyage specially undertaken for such transmissions, e.g. if she had been diverted from her ordinary course and had touched or was going to touch at a port outside her ordinary course for the purpose of transmitting

Un-  
neutral  
Service  
creating  
Enemy  
Char-  
acter.

§ 410. In contradistinction to cases of unneutral service which are similar to carriage of contraband and involve treatment analogous to the treatment of contraband, the Declaration of London enumerated in Article 46 four cases of kinds of unneutral service which invest a neutral vessel with enemy character, thus exposing her to condemnation and to the same treatment, in a general way, as if she were an enemy merchant-vessel.<sup>1</sup> These cases are :

(1) When a neutral vessel took a direct part in the hostilities.<sup>2</sup>

(2) When a neutral vessel was under the orders or control of an agent placed on board by the enemy Government.<sup>3</sup>

intelligence to the enemy. A liner, therefore, transmitting intelligence to the enemy in the ordinary course of her voyage might not be considered to be rendering unneutral service, and might not be punished. However, self-preservation would in a case of necessity have justified a belligerent in temporarily detaining such a liner for the purpose of preventing the intelligence from reaching the enemy (see below, § 413).

The conception 'transmission of intelligence' was not defined by the Declaration of London. It certainly meant not only oral transmission of intelligence, but also the transmission of despatches containing intelligence. The transmission of any political intelligence of value to the enemy, whether relating to the war or not, ought to have been considered unneutral service, unless it was intelligence transmitted from the enemy to neutral Governments, or *vice versa*, or from the enemy Government to its diplomatic agents and consuls abroad in neutral States. (In the case of the *Iro-Maru*, which belonged not to a neutral but to an allied subject, and was condemned for transporting an agent of the enemy State charged with carrying important despatches in the interests of the enemy State, Article 45 of the Declaration of London, which in terms applies only to neutral ships, seems to have been applied by

analogy : Fauchille, *Jur. fr.*, i. 323, and, on appeal, *R.G.*, xxvii. (1920), *Jurisprudence*, p. 33.)

<sup>1</sup> See above, § 89 (2).

<sup>2</sup> This might occur in several ways, but such a vessel in every case was to lose her neutral character and acquire enemy character, just as does a subject of a neutral Power who enlists in the ranks of the enemy armed forces. But a distinction had to be made between taking a direct part in the hostilities—for instance, rendering assistance to the enemy fleet during battle—and acts of a piratical character. If the neutral merchantman, without letters of marque during war, and from hatred of one of the belligerents, were to attack and sink his merchantmen, she would be considered, and could therefore be treated as, a pirate; see above §§ 85, 181, 254. On the disputed but now unimportant question whether neutral subjects accepting letters of marque from a belligerent may be treated as pirates or not see above, §§ 83 and 330.

<sup>3</sup> The presence of such agent, and the fact that the vessel sailed under his orders or control, show clearly that she was really for all practical purposes part and parcel of the enemy forces. See *The Thor* (1914) 1 B. and C.P.C. 229; *The Hanamel* (1914) 1 B. and C.P.C. 347.

(3) When a neutral vessel was in the exclusive employment of the enemy Government.<sup>1</sup>

(4) When a neutral vessel was exclusively appropriated either to the transport of enemy troops, or to the transmission of intelligence in the interest of the enemy.<sup>2</sup>

However, the provisions of the Declaration of London have not secured ratification, and are therefore not legally binding.<sup>3</sup>

<sup>1</sup> This could have occurred in two different ways: either the vessel might have been rendering a specific service in the exclusive employment of the enemy, as, for instance, did those German merchantmen during the Russo-Japanese War which acted as colliers for the Russian fleet en route for the Far East; or the vessel might be chartered by the enemy, so that she was entirely at his disposal for any purpose he might choose, whether connected with the war or not. See *The Alkor*, *Entscheidungen*, ii. 313; *Marouli v. Germany* (Greco-German Mixed Arbitral Tribunal), *Annual Digest*, 1927-1928, Case No. 388.

Three cases of interest occurred in 1905, during the Russo-Japanese War. *The Industrie* (Takahashi, p. 732; Hurst, ii. p. 323), a German vessel, and a French vessel, *The Quang-nam* (Takahashi, p. 735; Hurst, ii. p. 343), were condemned for being in the employ of Russia as reconnoitring vessels. *The Australia* (Hurst, ii. p. 373), an American vessel, was condemned for having been chartered by the Russian Government for the carriage of cargo, and having a Russian official on board.—During the World War the interesting case of *The Zambesi* (1914) 1 B. and C.P.C. 358 occurred, but she was a ship belonging to one belligerent and, apparently in ignorance of the state of war, rendering service to another. See also *The Island in Z.I.*, xxvii. p. 249, and, on appeal, *Entscheidungen*, ii. 8; *The Draupner*, *ibid.*, ii. p. 162; *The Esperanza*, *ibid.*, ii. p. 169 (neutral vessels chartered by Great Britain); and for other cases, Verzijl,

§§ 557-559. And see *Costomenis v. Germany* (decided in February 1929, by the Greco-German Mixed Arbitral Tribunal), *Annual Digest*, 1929-1930, Case No. 302.

<sup>2</sup> This case is different from the case—provided for by Article 45 (1)—of a vessel on a voyage specially undertaken with a view to the carriage of individual members of the armed forces of the enemy. Whereas in that case a vessel merely rendered a specific service, in this case the vessel is for the time being wholly and continuously devoted to the rendering of unneutral service. For the time being she is, therefore, actually part and parcel of the enemy marine. For this reason she was considered to have lost her neutral character, even if, at the moment an enemy cruiser searched her, she was engaged neither in the transport of troops nor in the transmission of intelligence. And it made no difference whether the vessel was engaged by the enemy, and paid, for the transport of troops or the transmission of intelligence, or whether she rendered the service gratuitously.

During the World War the Italian Prize Court condemned an Albanian vessel, *La Bella Scutarina*, for transmitting intelligence to the Austrians: Fauchille, *Jur. ital.*, p. 45.

As regards the meaning of the term 'transmission of intelligence' see above, § 409.

As to the effect of a plea of compulsion see above, § 408 (n.).

<sup>3</sup> And see above, § 333 (n.), as to the treatment of neutral vessels rendering unneutral service in respect of asylum in neutral ports.

## II

## CONSEQUENCES OF UNNEUTRAL SERVICE

See the literature quoted above at the commencement of § 407.

Capture  
for Un-  
neutral  
Service.

§ 411. According to customary rules of International Law, adopted also in the unratified Declaration of London, a neutral vessel may be captured if visit or search establishes the fact, or arouses grave suspicion, that she is rendering unneutral service to the enemy.<sup>1</sup> Such capture may take place anywhere on the open sea or in the territorial maritime belt of either belligerent.

Mail-steamers are, in principle, not exempt from capture for unneutral service. Although, according to Article 1 of Convention XI., the postal correspondence of belligerents and neutrals, whether official or private in character, found on board a vessel on the sea is inviolable,<sup>2</sup> and a vessel may never, therefore, be considered to be rendering unneutral service by carrying amongst her postal correspondence despatches containing intelligence of the enemy, a mail-steamer is nevertheless<sup>3</sup> not exempt from the laws and customs of naval war respecting neutral merchantmen. A mail-boat is, therefore, exposed as much as any other merchantman to capture for rendering unneutral service.

Capture is allowed only so long as the vessel is *in delicto*, i.e. during the time in which she is rendering unneutral service or is being pursued for having done so.

Penalty  
for Un-  
neutral  
Service.

§ 412. According to the practice prevailing before the Naval Conference of London, a neutral vessel captured for carriage of persons or despatches in the service of the enemy could be confiscated. Moreover, according to British<sup>4</sup> practice, such part of the cargo as belonged to the owner of the vessel was likewise confiscated.<sup>5</sup> If the vessel was not found guilty of carrying persons or despatches in the service

<sup>1</sup> The successful performance of the service undertaken is not essential to constitute the offence.

<sup>2</sup> See above, §§ 191, 319.

<sup>3</sup> See Article 2.

<sup>4</sup> *The Friendship* (1807) 6 C. Rob.

420; *The Atalanta* (1808) 6 C. Rob. 440. See Holland, *Prize Law*, §§ 95 and 105.

<sup>5</sup> See, however, *The Hope* (1808) 6 C. Rob. 463 (n.).

of the enemy, and was not therefore condemned, the Government of the captor could nevertheless detain the persons as prisoners of war and confiscate the despatches, if they were of such a character as would have made a vessel which was cognisant of their character liable to punishment for transporting them for the enemy.

The unratified Declaration of London recognised these three rules. Articles 45 and 46 declared any vessel rendering any kind of unneutral service to the enemy liable to confiscation, and also such part of the cargo as belonged to the owner of the confiscated vessel. And Article 47 provided that, although a neutral vessel might not be liable to condemnation, the capturing State might nevertheless detain as prisoners of war any members of the armed forces of the enemy who were found on board. The case of despatches found on board was not mentioned by Article 47.<sup>1</sup>

Although the unratified Declaration of London meted out the same punishment for the several kinds of unneutral service which it enumerated, it did make a distinction with regard to the treatment in other respects of vessels captured for rendering unneutral service.

Article 45 provided for a neutral vessel captured for having rendered either of the two kinds of unneutral service mentioned in it, treatment in a general way the same as that of a neutral vessel captured for the carriage of contraband. The vessel did not lose her neutral character, and had under all circumstances and conditions to be taken before a Prize

<sup>1</sup> The mere fact that a neutral vessel is rendering unneutral service is not sufficient for her condemnation; in addition, *mens rea* is required. (As to *mens rea* in prize law see Lord Merrivale, *op. cit.*, above, § 407.) Now, as regards the four kinds of unneutral service which create enemy character, *mens rea* is obviously always in existence, and therefore always presumed to be present. For this reason Article 46, in contradistinction to Article 45, did not refer to the knowledge of the vessel of the outbreak of hostilities. But as regards the other cases of unneutral service, Article 45 provided that the vessel might

not be confiscated if she was encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, had had no opportunity of disembarking the passengers concerned. On the other hand, a vessel was to be deemed, according to Article 45, to be aware of the existence of a state of war if she had left an enemy port subsequent to the outbreak of hostilities, or a neutral port subsequent to the notification of the outbreak of hostilities to the Power to which such port belonged, provided that such notification was made in sufficient time.

Court, unless—see Article 49—to take her into a port of the capturing State would have involved danger to the safety of the capturing vessel or to the success of the military operations in which she was engaged at the time. And an appeal from the national Prize Courts was to lie to the proposed International Prize Court.<sup>1</sup>

Article 46, on the other hand, provided treatment for a vessel captured for having rendered any of the four kinds of unneutral service enumerated in it which, in a general way, was the same as that of a captured enemy merchantman. Such a vessel acquired enemy character. Accordingly,<sup>2</sup> all enemy goods on the vessel might be seized, all goods on board were to be presumed to be enemy goods, and the owners of neutral goods on board were to have to prove their neutral character. Further, the rules of Articles 48 and 49 concerning the destruction of neutral vessels were not to apply. Again, no appeal was to lie from the national Prize Courts to the proposed International Prize Court by the owner of the ship except on the one question, whether the act of which she was accused had the character of unneutral service.<sup>3</sup>

However, the rules of the Declaration are not legally binding, and the old customary rules are still applicable.

Seizure of  
Enemy  
Persons  
and Des-  
patches  
without  
Seizure of  
Vessel.

§ 413. According to the British<sup>4</sup> and American practice, as well as that of some other States, which prevailed prior to the Naval Conference of London, whenever a neutral vessel was stopped for carrying persons or despatches for the enemy, these could not be seized unless the vessel was seized at the same time. The release, in 1861, during the American Civil War, of Messrs. Mason<sup>5</sup> and Slidell, who had been forcibly taken off the *Trent*, while the ship herself was allowed to continue her voyage, was based by the United States on the fact that the seizure of these men, whom the American Government professed to regard as

<sup>1</sup> See below, §§ 438-447.

<sup>2</sup> See above, § 89.

<sup>3</sup> The question whether, if the vessel was destroyed by the captor, the innocent owners of the neutral goods on board might claim compensation, would have had to be

decided in the same way as the question whether the owners of neutral goods on a destroyed enemy merchantman have a claim to compensation; see above, § 194.

<sup>4</sup> See Holland, *Prize Law*, § 104.

<sup>5</sup> See above, § 408 (n.).

'contraband of war,' without the seizure of the vessel, was illegal.

Since, according to the unratified Declaration of London, a neutral vessel rendering unneutral service of any kind was liable to be confiscated, it is evident that in such a case the enemy persons and despatches concerned might not be taken off the vessel unless the vessel herself was seized and brought into a port of a Prize Court. However, Article 47 provided that any member of the armed forces of the enemy found on board a neutral merchant-vessel might be taken off and made a prisoner of war, although there might be no ground for the capture of the vessel. Therefore, if a vessel carried individual members of the armed forces of the enemy in the ordinary course of her voyage,<sup>1</sup> or if she transported a military detachment of the enemy and the like without being aware of the outbreak of hostilities, the members of the armed forces of the enemy on board might be seized, although the vessel herself might not be seized, as she was not rendering unneutral service.

The Declaration of London did not mention the case of enemy despatches embodying intelligence found on board such a neutral vessel as might not herself be captured for such carriage. For instance, if a mail-steamer, pursuing her ordinary course, carried a despatch of the enemy, not in her mail-bags, but separately (in which case, according to Article 45, the vessel was not liable to seizure), might

<sup>1</sup> Accordingly, in January 1912, during the Turco-Italian War, the Italian gunboat *Voturno*, after having overhauled, in the Red Sea, the British steamer *Africa* going from Hodeida to Aden, took off and made prisoners of war Colonel Riza Bey and eleven other Turkish officers. Although the Declaration of London was not ratified by Great Britain, she did not protest. The case of the *Manouba* ought likewise to be mentioned here. This French steamer, which plied between Marseilles and Tunis, was captured on January 18, 1912, by the *Agordat*, an Italian torpedo-boat, in the Mediterranean, brought to Cagliari, and then released after twenty-nine Turkish passengers, who were sup-

posed to be Turkish officers on their way to the theatre of war, had been forcibly taken off and made prisoners. On the protest of France, it was agreed between the parties that the case should be settled by an arbitral award of the Permanent Court of Arbitration at The Hague, Italy asserting that she had only acted in accordance with Article 47 of the Declaration of London. The Court, on May 6, 1913, gave its award in favour of France, because the commander of the *Agordat* did not demand from the *Manouba* the handing over of the Turks, but captured her. See Rapisardi-Mirabelli in *R.I.*, 2nd ser., xv. (1913) pp. 135-138, and Ruzé in *R.I.*, 2nd ser., xvi. (1914) pp. 128-136.



despatches be seized without the seizure of the vessel? The question ought to be answered in the affirmative.

However, the rules of the Declaration of London are not legally binding.<sup>1</sup>

Seizure of  
Enemy  
Re-  
servists.

§ 413a. The practice prior to the World War in the matter of removing persons other than those actually incorporated in the enemy forces was not settled. As stated above, Article 47 of the Declaration of London provided that only the latter may be taken off. On November 1, 1914, the British Foreign Office gave notice that, 'in view of the action taken by the German forces in Belgium and France of removing as prisoners of war all persons who are liable to military service, His Majesty's Government have given instructions that all enemy reservists on neutral vessels should be made prisoners of war.' The French Government published a similar notice. In consequence, all enemy subjects of military age found on board neutral vessels on the high seas were taken off by the cruisers of the Allies and made prisoners of war.<sup>2</sup>

<sup>1</sup> Quite different from the case of the seizure of such enemy persons and despatches as a vessel cannot carry without exposing herself to punishment is the case where a vessel has such enemy persons and despatches on board as she is allowed to carry, but a belligerent believes it to be necessary in the interest of self-defence to seize them. Since necessity in the interest of self-preservation is, according to International Law, in certain cases an excuse for an illegal act, a belligerent may seize such persons and despatches, provided that their seizure is not merely desirable, but absolutely necessary in the interest of self-defence. For instance, seizure of an enemy ambassador on board a neutral vessel would be justifiable if he was on the way to submit to a neutral a draft treaty of alliance injurious to the other belligerent. (See Hall, § 253; Rivier, ii. p. 390; above, i. §§ 129 and 130.)

<sup>2</sup> The following are examples: The Italian steamer *Ancona*, sailing from New York to Italy, was held up by an English cruiser near Gibraltar, and seventy German passen-

gers were removed and taken to Gibraltar as prisoners of war. The Dutch liner *New Amsterdam* was stopped by a French cruiser on the high seas off Brest, and 400 Germans and 250 Austrians were removed and made prisoners of war. Of the protests of the neutral Governments affected, only those of the United States of America were of any avail. When the American steamer, *Windber*, two days after having left Colon, was stopped in November 1914 by the French cruiser *Condé*, and August Piepenbrink, a German waiter, was taken off, brought to Kingston in Jamaica, and detained as a prisoner of war, the United States protested, and after some correspondence the French and British Governments consented to set him free, 'as a friendly act, while reserving the question of principle involved' (see *A.J.*, ix. (1915), Special Suppl., pp. 353-360; Hyde, ii. § 819 (n.); and above, vol. i. § 313 (n.)). Again, when, in February 1916, the American steamship *China* was stopped by the British cruiser *Laurens* on the high seas about ten miles from the entrance

While at the beginning of the war, at a time when the Declaration of London was still acted upon, that practice was justified as a measure of reprisals, it was subsequently based on the wider and, it is believed, unimpeachable ground that there is no valid reason for differentiating between persons actually enrolled in the armed forces of the enemy and those most likely to be incorporated in them when they reach their country.<sup>1</sup> This was also the view propounded by Great Britain in reply to the protest of Japan against the seizure, in January 1940, of a number of German nationals of military age from the *Asama Maru*, a Japanese steamer.<sup>2</sup>

to the Yang-tze-kiang, and twenty-eight Germans, eight Austrians, and two Turks were taken off, carried to Hong-Kong, and there detained as prisoners of war, the United States Government protested, and after some correspondence the prisoners were set free, although Great Britain reserved the question of principle (see *A.J.*, x. (1916), Special Suppl., pp. 427-432; Hyde, ii. §§ 818-820; Garner, ii. § 540; Malkin in *B.Y.*, 1924, pp. 66-77). For other examples see Garner, ii. § 539. See also *Harvard Research* (1939), pp. 602-618 and Briggs in *A.J.*, xxxiv. (1940) pp. 249-259.

<sup>1</sup> See the British note of July 15, 1916 in connection with the case of the *China* (see above, p. 704); *U.S. For. Rel.*, Suppl., 1916, p. 653. The French instructions of 1934 expressly provide for the seizure from neutral

vessels of, among others, all enemy passengers 'aptés au service militaire' (Article 64).

<sup>2</sup> Subsequently nine out of twenty-one Germans were released on the ground that they were relatively unsuitable for military service. It was arranged that Japanese steamers would in the future refuse to accept passengers 'who are, or who are suspected to be embodied in the armed forces of belligerents.' For the exchange of correspondence see Cmd. 6166. In 1894, in the course of the Sino-Japanese War, Japan took off a French vessel two United States citizens who were proceeding to China in connection with a contract offering to the Chinese Government the use of a new kind of torpedo. They were subsequently released on parole. See *R.G.*, ii. (1895) p. 128.

## CHAPTER VI

### VISITATION, CAPTURE, AND TRIAL OF NEUTRAL VESSELS

#### I

#### VISITATION

Bynkershoek, *Quaestiones Juris publici*, 1, c. 14—Vattel, iii. § 114—Hall, §§ 270-276—Manning, pp. 433-460—Phillimore, iii. §§ 322-344—Twiss, ii. §§ 91-97—Halleck, ii. pp. 271-304—Taylor, §§ 685-689—Wharton, iii. §§ 325, 346—Wheaton, §§ 524-537—Moore, vii. §§ 1199-1205—Hershey, Nos. 516-520—Bluntschli, §§ 819-826—Heffter, §§ 167-171—Geffcken in *Holtzendorff*, iv. pp. 773-781—Klüber, §§ 293-294—G. F. Martens, ii. §§ 317, 321—Ullmann, § 195—Fauchille, §§ 1657-1673—Despagnet, Nos. 717-721—Rivier, ii. pp. 423-426—Nys, iii. pp. 679-690—Calvo, v. §§ 2939-2991—Fiore, iii. Nos. 1630-1641, and *Code*, Nos. 1876-1900—Martens, ii. § 127—Kleen, ii. §§ 185-199, 209—Gessner, pp. 278-332—Boeck, Nos. 767-769—Dupuis, Nos. 239-252, and *Guerre*, Nos. 189-204—Bernsten, § 11—Schramm, §§ 13-14—Nippold, ii. § 35—Perels, §§ 52-55—Testa, pp. 230-242—Ortolan, ii. pp. 214-245—Hautefeuille, iii. pp. 1-298—Holland, *Prize Law*, §§ 1-17, 155-230—U.S. Naval War Code, Articles 30-33—Hyde, ii. §§ 724-735—Baty, pp. 309-319—Keith's Wheaton, pp. 1131-1144—Rolin, §§ 1283-1297—Suarez, §§ 443-550—Verzijl, §§ 672-696—Kunz, pp. 169-172—Spaight, *Air*, pp. 382-409, 466, 471, 472—Schlegel, *Sur la visite des vaisseaux neutres sous convoi* (1800)—*Letters by Historicus* (1863), *The Right of Search*, pp. 175-184—Mirbach, *Die völkerrechtlichen Grundsätze des Durchsuchungsrechts zur See* (1903)—Loewenthal, *Das Untersuchungsrecht des internationalen Seerechts in Krieg und Frieden* (1905)—Atherley-Jones, *Commerce in War* (1907), pp. 299-360—Hirschmann, *Das internationale Priserecht* (1912), §§ 33-34—Wehberg, § 7—Garner, ii. § 500—Navello, *L'évolution du droit de visite et du droit de prise au cours de la dernière guerre* (1925), pp. 117-144—Garner, *Developments* (1925), pp. 365-366, 788-790—Frasconà, *Visit, Search and Seizure on the High Seas* (1938)—Jessup and Deak, *Neutrality*, i.: *The Origins* (1935), pp. 157-200—Colombos, §§ 226-234—*Harvard Research* (1939), pp. 535-547—Duboc in *R.G.*, iv. (1897) pp. 382-403—Allin in *Minnesota Law Review*, April 1917—Higgins in *B.Y.*, 1926, pp. 43-53, and in *Hague Recueil*, 1926 (i.), pp. 69-128—General Report on Proposed Rules of Aerial Warfare, ch. vii., Cmd. 2201 of 1924, *A.J.*, xvii. (1923), Suppl., pp. 257-260. See also many of the monographs quoted above at the commencement of § 391; Bulmerincq's articles on *Le droit des prises maritimes* in *R.I.*, x.-xiii. (1878-1881); and the General Report presented to the International Naval Conference of London on behalf of the Drafting Committee, Article 63, Cmd. 4554, p. 63.

§ 414. The right of visitation<sup>1</sup> is the right of belligerents to visit and, if need be, search neutral merchantmen for the purpose of ascertaining whether these vessels really belong to the merchant marine of neutrals, and, if this is found to be the case, whether they are attempting to break blockade, or are carrying contraband, or rendering unneutral service to the enemy. The right of visit and search was already mentioned in the *Consolato del Mare*; and although it has often<sup>2</sup> been contested, its *raison d'être* is so obvious that it has long been universally recognised in practice. It is indeed the only means by which belligerents are able to ascertain whether neutral merchantmen intend to bring assistance to the enemy and to render him 'unneutral services.'<sup>3</sup>

§ 415. The right of visit and search may be exercised by all warships<sup>4</sup> and military aircraft<sup>5</sup> of belligerents.<sup>6</sup> But since it is a belligerent right, it may, of course, only be exercised after the outbreak, and before the end, of war. The right of visitation which men-of-war of all nations have in time of peace in a case of suspicion of piracy<sup>7</sup> has nothing to do with the belligerent right of visit and search. But since an armistice does not bring war to an end, and since

 Right of  
Visita-  
tion, by  
whom,  
when, and  
where  
exercised.

<sup>1</sup> This right of visitation is not an independent right, but is involved in the right of either belligerent—see above, § 314—to punish neutral vessels breaking blockade, carrying contraband, and rendering unneutral service. It is a *right*, in contradistinction to the *duty*, of every belligerent to visit an enemy merchantman if he desires to capture her. See Oppenheim in *Z.V.*, viii. (1914) pp. 154-169.

<sup>2</sup> See, for instance, Hübner, *De la saisie des bâtiments neutres* (1759), i. p. 227.

<sup>3</sup> See the statement of the right of visit and search by Lord Stowell in *The Maria* (No. 1) (1799) 1 C. Rob. at pp. 360-362. A 'Règlement international des prises maritimes' was adopted at Heidelberg in 1887 by the Institute of International Law, §§ 1-29 of which regulate visit and search. See *Annuaire*, ix. (1888) p. 218.

<sup>4</sup> A captured neutral merchantman does not become a commissioned vessel by having a prize crew on board, and has no right to visit, search, and capture other neutral merchantmen. When, therefore, in May 1917, during the World War, a captured Dutch trawler with a German prize crew on board captured the *Koningin Emma*, a Dutch steam trawler, which stranded while being taken to a German port, the Dutch Government protested. The German Government made an apology, and compensated the owners of the *Koningin Emma* for the loss of their vessel; see also *The Tell*, Fauchille, *Jur. all.*, 127.

<sup>5</sup> For instances in the World War see Spaight, *Air*, pp. 471-472.

<sup>6</sup> In former times also by privateers.

<sup>7</sup> See above, vol. i. § 266 (2).

the exercise of the right of visitation is not an act of warfare, it may be exercised during the time of a partial or general armistice.<sup>1</sup> The region where the right may be exercised is the maritime territorial belt of either belligerent, and the open sea, but not the maritime territorial belt of neutrals. Whether the part of the open sea in which a belligerent man-of-war meets with a neutral merchantman is near or far away from that part of the world where hostilities are actually taking place makes no difference, so long as there is suspicion against the vessel. The question whether the men-of-war of a belligerent may exercise the right of visitation in the maritime territorial belt of an ally is solely one between the belligerent and his ally, provided that the latter is already a belligerent.

Only  
Private  
Vessels  
may be  
visited.

§ 416. During the nineteenth century it became universally recognised that neutral men-of-war are not objects of the right of visit and search of belligerents.<sup>2</sup> And the same is valid regarding public neutral vessels which sail in the service of armed forces, such as transport vessels, for instance. Doubt exists as to the position of public neutral vessels not sailing in the service of armed forces, *e.g.* mail-boats belonging to a neutral State. It is asserted<sup>3</sup> that, if commanded by an officer of the navy, they must be treated in the same way as men-of-war, but that it is desirable to ask the commanders to give their word of honour assuring the absence of contraband and unneutral service.

Vessels  
under  
Convoy.  
The Right  
of Convoy.

§ 417. Sweden in 1653, during the war between Great Britain and the Netherlands, claimed<sup>4</sup> that the belligerents ought to waive their rights of visitation over Swedish

<sup>1</sup> But this is not universally recognised. Thus Hautefeuille, iii. p. 91, maintains that during a general armistice the right of visitation may not be exercised, and § 5 of the 'Règlement international des prises maritimes' of the Institute of International Law took up the same attitude.

In strict law the right of visit and search may be exercised even after the conclusion of peace before the treaty of peace is ratified, though the above-mentioned § 5 of the 'Règlement' declares that it ceases

'avec les préliminaires de la paix.' See below, § 436. Presumably the right was exercised in the case of *The Rannveig* [1922] 1 A.C. 97; 3 B. and C.P.C. 1013, which was captured during an armistice and subsequently condemned; see above, § 231.

<sup>2</sup> In former times Great Britain tried to extend visitation to neutral men-of-war. See Manning, p. 455.

<sup>3</sup> See, for instance, Gessner, p. 297 and Perels, § 52, iv.

<sup>4</sup> See Robinson, *Collectanea maritima* (1801), pp. 145-157.

merchantmen if they sailed under the convoy of a Swedish man-of-war whose commander asserted that there was no contraband on board the convoyed vessels—an exemption which is referred to as 'the right of convoy'; but the Peace of Westminster in 1654 brought this war to an end without any decision upon this claim. In 1756 the Netherlands, then neutral, claimed the right of convoy. But it was not until the last quarter of the eighteenth century that the right of convoy was more and more insisted upon by Continental neutrals. During the American War of Independence in 1780, the Netherlands again claimed it, and when they themselves waged war against Great Britain in 1781 they ordered their men-of-war and privateers to respect it. Between 1780 and 1800, treaties were concluded in which Russia, Austria, Prussia, Denmark, Sweden, France, the United States of America, and other States recognised the right. But Great Britain always refused to do so, and in July 1800 the action of a British squadron in capturing a Danish man-of-war and her convoy of six merchantmen for resistance to visitation called the Second Armed Neutrality into existence. Yet Great Britain still resisted. It was only to Russia<sup>1</sup> that by Article 4 of the 'Maritime Convention' of St. Petersburg of June 17, 1801, she conceded that vessels under convoy should not be visited by privateers; and although during the Crimean War she waived her claim on account of her naval co-operation with France (the latter recognising the right of convoy on principle), she waived it only for that particular war. Although during the nineteenth century more and more treaties stipulating the right of convoy were concluded, it was not mentioned in the Declaration of Paris of 1856, and Great Britain refused to recognise it throughout the century. However, Great Britain abandoned her opposition at the Naval Conference of London of 1908-1909, and the unratified Declaration of London proposed to settle the matter by Articles 61 and 62 in a manner which involved a concession from the traditional British

<sup>1</sup> But this concession extended to Denmark and Sweden, since these Powers (see above, § 290) acceded to the Maritime Convention on October 23, 1801.

view.<sup>1</sup> However, the Declaration has not been ratified, and it is apparent from the attitude of the British Government during the World War that it is no longer prepared to give effect to the concession made at the Naval Conference of London and recognise the right of convoy. Thus, when the Dutch Government announced in 1918 that a convoy would be despatched to the Dutch East Indies carrying Government passengers and goods, the British Government expressly refused to recognise the right of convoy, insisted upon the right to visit and search neutral merchantmen, even if convoyed, and only agreed to abstain from exercising that right on that occasion upon special conditions which the Dutch Government accepted.<sup>2</sup>

No  
Universal  
Rules  
regarding  
Mode of  
Visitation.

§ 418. There are no rules of International Law which lay down all the details of the formalities of the mode of visitation. A great many treaties regulate them as between the parties, for many of which Article 17 of the Peace Treaty of the Pyrenees of 1659 has served as a model; and all

<sup>1</sup> Neutral vessels under the convoy of a man-of-war flying the same flag were to be exempt from search, and might not be visited if the commander of the convoy, at the request of the commander of the belligerent cruiser, which desired to visit them, gave, in writing, all the information as to the character of the convoyed vessels and their cargoes that could be obtained by search. Should the commander of the belligerent man-of-war have reason to suspect that the confidence of the commander of the convoy had been abused, he might not himself resort to visit and search, but had to communicate with the commander of the convoy. The latter had to investigate the matter, and record the result of his investigation in a report, a copy of which was to be given to the commander of the belligerent cruiser. If, in the opinion of the commander of the convoy, the facts stated in the report justified the capture of one or more of the convoyed vessels, he was to withdraw protection from the offending vessels, and the belligerent cruiser might then capture them.

In case a difference of opinion arose between the commander of the con-

voy and the commander of the belligerent cruiser—for instance, with regard to the question whether certain goods were absolute or conditional contraband, or whether the port of destination of a convoyed vessel was an ordinary commercial port or a port which served as a base of supply for the armed forces of the enemy and the like—the commander of the belligerent cruiser was to have no power of overruling the decision of the commander of the convoy. He could only protest and report the case to his Government, which would have had to settle the matter by means of diplomacy.

Had the Declaration of London been ratified, its rules concerning convoy would also have applied to belligerent military aircraft meeting convoyed neutral merchantmen at sea.

<sup>2</sup> Parl. Papers, Misc. No. 13 (1918), Cmd. 9028. As to the American view of Neutral Convoy see Hyde, ii. § 734. As to the possibility of Air Convoy see Spaight, *Commerce*, pp. 36-37. And see generally on the whole subject Gordon, *La visite des convois neutres* (1935), and in *R.G.*, xli. (1934) pp. 586-630.

maritime nations have given instructions to their men-of-war regarding them. Thereby uniform formalities are practised with regard to many points ; but regarding others the practice of the several States differs.

§ 419. A man-of-war which wishes to visit a neutral vessel must stop her, or make her bring to. Although the chasing of vessels may take place under false colours, the right colours must be shown when vessels are stopped.<sup>1</sup> The order for stopping can be given <sup>2</sup> by hailing or by firing one or two blank cartridges from the so-called affirming gun, and, if necessary, by firing a shot across the bows of the vessel.<sup>3</sup> If nevertheless the vessel does not bring to, the man-of-war is justified in using force to compel her to bring to.<sup>4</sup> Once the vessel has been brought to, the man-of-war also brings to, keeping a reasonable distance. With regard to this distance, treaties very often stipulate either the range of a cannon shot, or half such width, or even a range beyond a cannon shot ; but all this is totally impracticable.<sup>5</sup> The distance must vary according to the requirements of the case, and according to wind and weather.

Stopping  
of Vessels  
for the  
Purpose  
of Visita-  
tion.

The rules concerning the stopping of vessels for visitation apply also to visitation by belligerent aircraft. The order can in that case be given by hailing, or by some other sign.

§ 420. The vessel, having been stopped or brought to, is visited <sup>6</sup> by one or two officers sent in a boat from the man-of-war. These officers examine the papers of the vessel to ascertain her nationality, the character of her cargo and passengers, and the ports from and to which she is sailing. Instead of visiting the merchantman and inspecting her papers on board, the practice is followed by the men-of-war of some States of summoning the master of the merchantman with his papers on board the former and examining the papers there.

<sup>1</sup> See above, § 211.

<sup>2</sup> See above, vol. i. § 268.

<sup>3</sup> On emergency measures with regard to visitation resorted to by Great Britain during the World War see Hall, § 273 (n.).

<sup>4</sup> See for several cases Verzijl,

§ 678. As to a suggested modification in the case of visiting aircraft see Spaight, *Air*, pp. 472-473.

<sup>5</sup> See Ortolan, ii. p. 220, and Perels, § 53, pp. 284, 285.

<sup>6</sup> See above, vol. i. § 268, and Holland, *Prize Law*, §§ 195-216.



If everything is found in order and there is no suspicion of fraud, the vessel is allowed to continue her course, a memorandum of the visit having been entered in her log-book. On the other hand, if the inspection of the papers shows that the vessel is carrying contraband or rendering unneutral service, or that she is for some other reason liable to capture, she is at once seized. But it may be that, although ostensibly everything is in order, there is nevertheless grave suspicion of fraud against the vessel. In such case she may be searched.

**Search.** § 421. Search at sea<sup>1</sup> is effected<sup>2</sup> by one or two officers, and if need be, a few men, in presence of the master of the vessel. Care must be taken not to damage the vessel or the cargo, and no force whatever must be applied. No lock must be forcibly broken open by the search-party; the master is to be required to unlock it. If he fails to comply with the demand, he is not to be compelled to do so, since his refusal to assist the search in general, or the search of a locked part of the vessel or of a locked box in particular, is at once sufficient cause for seizing the vessel.<sup>3</sup> Search being completed, everything removed has to be replaced with care. If the search has satisfied the searching officers, and dispelled all suspicion, a memorandum is entered in the log-book of the vessel, and she is allowed to continue her voyage. On the other hand, if search has brought the presence of contraband or any other cause for capture to light, the vessel is seized. But since search can never take place so thoroughly on the sea as in a harbour, it may be that, although search has disclosed no proof to bear out the suspicion, grave suspicion still remains. In such a case she may be seized and brought into a port for the purpose of being searched there as thoroughly as possible. But the commander of a man-of-war seizing a vessel in such a case must bear in mind that full indemnities must be paid to the vessel for loss of time and other losses sustained, if finally she is found innocent and the Prize Court declares that there was no reasonable

<sup>1</sup> As to the general practice followed by the Allies during the World War of taking vessels into port for search see below, § 421a.

<sup>2</sup> See above, vol. i. § 269, and Holland, *Prize Law*, §§ 217-230.

<sup>3</sup> See also below, § 423.

ground of suspicion to justify the seizure of the vessel.<sup>1</sup> Therefore, after a search at sea has brought nothing to light against the vessel, seizure should take place only in case of grave suspicion.

§ 421a. During the World War, the United States of America complained that British cruisers, instead of searching American vessels on the high seas at the time of visit, made a practice of taking them into port for search. The British Government urged in justification of this procedure<sup>2</sup> that the size of the modern liner, the great amount of cargo carried by her, and the elaborate arrangements in vogue for concealing the identity of cargoes, made it impossible to carry out a thorough search on the high seas, especially as the danger of attacks from enemy submarines was so great, and 'the conditions during winter in the North Atlantic frequently render it impracticable for days together for a naval officer to board a vessel on her way to Scandinavian countries.' The British Notes added that ships had been

Bringing  
Vessels  
into Port  
for  
Search.

<sup>1</sup> *The Luna* (1810) Edwards 190; *The Ootsee* (1856) 9 Moore P.C. 150; *The Baron Stjernblad* [1918] A.C. 173; 3 B. and C.P.C. 17; *The Sigurd* [1917] P. 250; 3 B. and C.P.C. 87, where it was held that costs and damages will not be awarded when the validity of the seizure depends upon a difficult question of law; *The Bernisse* [1921] 1 A.C. 458; 3 B. and C.P.C. 771; and Article 64 of the unratified Declaration of London. See also § 435 (n.) and cases cited there.

<sup>2</sup> The British Privy Council in *The Zamora* [1916] 2 A.C. at p. 108; 2 B. and C.P.C. at p. 28, and the French Prize Court of Appeal in *The Federico* (1915), *R.G.*, xxii. (1915), *Jurisprudence*, p. 17, xxiv. (1917), *Jurisprudence*, p. 11, Fauchille, *Jur. fr.*, 19, 287, considered the practice justifiable. See also *The Montana* (1919) 3 B. and C.P.C. 340. Article 182 of the Italian War Regulations of 1938 equally allows diversion. In general, writers are not disposed to question the legality of that practice. See, e.g., Hall, § 273; Genet, i. p. 439; Balladore Pallieri, p. 470; Colombos, § 229; Higgins, *Hague Conferences*, § 414, and in *Hague Recueil*, 11 (1926)

(i.), pp. 129-141; Vanselow, *Völkerrecht* (1931), p. 405; Mori, *The Submarine in War* (1931), pp. 126, 127; Van Eysinga in *Z.V.*, xvi. (1932) p. 616; Smith in *Hague Recueil*, 63 (1938) (i.), pp. 642-647. But see Hyde, ii. p. 444, and Baty, *Canons of International Law* (1930), p. 309. And see *Harvard Research* (1939), pp. 579-601.

Concerning the Dutch claim for damages for two torpedoed Dutch vessels, *The Bernisse* and *The Elve* [1921] 1 A.C. 458; 3 B. and C.P.C. 771, which were torpedoed by a German submarine while being forcibly taken to the port of Kirkwall for examination, see *Parl. Papers*, Misc. No. 1 (1918), Cmd. 8908, and (1919) 3 B. and C.P.C. 517. The German practice also showed many cases of 'einstweilige Aufbringung'; see for instance, *The Star*, Fauchille, *Jur. all.*, 52; *The Bertha Elisabeth*, Verzijl, § 707. As to visiting aircraft diverting merchantmen by signalling to them for the purpose of search elsewhere than *sur place* see Spaight, *Air*, pp. 468-472. Visit and search by submarines must be studied in connection with the question dealt with above, § 194a.

taken into port for search as long ago as the American Civil War, and again during the Russo-Japanese War and the Second Balkan War. The diplomatic discussion was continued,<sup>1</sup> but the Allied Governments adhered to the practice of taking vessels into port for search.<sup>2</sup> The same practice was followed in the war which broke out with Germany in 1939.<sup>3</sup>

The  
Navicert  
System.

§ 421b. The difficulties which arose out of the practice of diverting neutral vessels for search in belligerent ports led to the adoption at the beginning of 1916 of the system of so-called navicerts. Navicerts were certificates issued by the diplomatic or consular representative of the belligerent in a neutral country and testifying that the cargo on a vessel proceeding to a neutral port was not such as to be liable to seizure. They were issued after the matter had been referred to the home authorities for investigation and approval and after the cargo had been examined prior to departure. The effect of the issue of the navicert was that, in the absence of supervening suspicious circumstances, the vessel when encountered by the naval forces of the belligerent was allowed to proceed on her voyage without being conducted to port for search. The system of navicerts was adopted two months after the outbreak of the war in 1939 and used on a wide scale.<sup>4</sup>

<sup>1</sup> See the United States Notes of November 7, 1914, December 28, 1914, and November 6, 1915, and the British Notes of January 7, 1915, February 10, 1915, and April 24, 1916, in Parl. Papers, Misc. No. 6 (1915), Cmd. 7816, and No. 15 (1916), Cmd. 8234; see also Garner, ii. § 500, *A.J.*, x. (1916), Special Suppl., pp. 120 *et seq.*; the same, *Prize Law*, Nos. 442-445.

<sup>2</sup> In *Netherlands-American Steam Navigation Co. v. H.M. Procurator-General* [1926] 1 K.B. 84, it was held by the Court of Appeal that the exclusive character of the jurisdiction of Prize Courts prevented a neutral shipowner, who had sustained damage from the exercise of the practice of search in port, from claiming compensation in the War Compensation Court under the Indemnity Act, 1920. See also § 434 (n.). It would

seem that the belligerent's right to bring vessels into port for search is denied by implication in Article 1 of the Habana Convention of 1928 on Maritime Neutrality (see above, § 68).

<sup>3</sup> The protests of the United States on this occasion were based on the additional ground that the action of the Allies compelled American vessels to enter ports in combat areas (see above, p. 502) contrary to the prohibition of the United States Neutrality Law.

<sup>4</sup> In January 1940 navicerts were issued in the United States, Argentina, Brazil, and Uruguay to about twenty European countries. Up to that date 11,000 applications for navicerts had been received. See Ritchie, *The 'Navicert' System during the World War* (1938); and *Harvard Research* (1939), pp. 505-530, where proposals

§ 422. If a neutral merchantman resists visit or search, she is at once captured, and may be confiscated.<sup>1</sup> The question whether the vessel only, or also her cargo, could be confiscated for resistance is controversial. According to British<sup>2</sup> and American theory and practice, the cargo as well as the vessel is liable to confiscation. But Continental<sup>3</sup> writers emphatically argue against this, and maintain that the vessel only is liable to confiscation.

According to Article 63 of the unratified Declaration of London, resistance to the legitimate exercise of the right of visit, search, and capture was to involve in all cases the confiscation of the vessel, which by her forcible resistance acquired enemy character.<sup>4</sup> For this reason such goods on board as belonged to the master or owner of the vessel might be treated as enemy goods and confiscated. Enemy goods on board might then likewise be confiscated, although, when they were first shipped, the vessel bore neutral character. Further, all goods on board were then presumed to be enemy goods, and the owners of neutral goods on board would have had to prove the neutral character of their goods. Lastly, no appeal was to lie from the national Prize Courts to the proposed International Prize Court<sup>5</sup> by the owner of the ship except concerning the one question only, whether there was justification for capturing her on the grounds of forcible resistance.

However, the Declaration is unratified, and therefore not legally binding. Visit and search do not take place after a

are also discussed for similar certificates issued by neutral authorities. On occasions, instead of resorting to the procedure of the navicert system, neutral ships have obtained immunity from search on the high seas by giving an assurance that when the cargo reaches a neutral destination it will be held until examined and approved by the officials of the belligerent. It is not believed that the exercise of these measures of supervision or of those of the 'navicert' system in neutral territory constitutes a violation of neutrality. By a Decree of November 30, 1939, Belgium made it an offence for Belgian subjects or

corporations to submit to belligerent supervision in Belgium with the view to obtaining a safe-conduct or exemption from search for goods which might be considered contraband. It does not appear that this example was generally followed.

<sup>1</sup> See the case of the Italian vessel the *Porto Said*, which was condemned by an Austro-Hungarian Prize Court for attempting to escape and to ram an Austro-Hungarian submarine: *Vernizil*, § 687.

<sup>2</sup> *The Maria* (1799) 1 C. Rob. 340.

<sup>3</sup> See Gessner, pp. 318-321.

<sup>4</sup> See above, § 89.

<sup>5</sup> See below, §§ 438-447.

Consequences of Resistance to Visitation.

vessel has been captured for resistance; for the mere fact that she has resisted makes her liable to confiscation, and it becomes irrelevant whether visit and search would show her to be guilty or innocent.

What  
consti-  
tutes  
Resist-  
ance.

§ 423. According to the practice hitherto prevailing,<sup>1</sup> and also according to the unratified Declaration of London, a mere attempt on the part of a neutral merchantman to escape visitation does not in itself constitute resistance. But she may be chased and compelled by force to bring to, and she cannot complain if, in the endeavour forcibly to compel her to bring to, she is damaged or accidentally sunk. If, however, after the vessel has been compelled to bring to, visit and search show her to be innocent, she must be allowed to proceed on her course.

Resistance, to be penal, must be *forcible* resistance; e.g. if a vessel applies force in resisting any legitimate action by the belligerent cruiser which requires her to stop and to be visited and searched. It is not certain whether the actual application of force only, or a mere refusal on the part of the master, to show the ship's papers or to open locked parts of the vessel or locked boxes, and similar acts, would constitute forcible resistance.<sup>2</sup>

Sailing  
under  
Enemy  
Convoy  
equiv-  
alent  
to  
Resist-  
ance.

§ 424. Wheaton excepted, all writers would seem to agree that the fact of neutral merchantmen sailing under a convoy of enemy men-of-war is equivalent to forcible resistance on their part, whether they themselves intend to resist by force or not.<sup>3</sup> But the Government of the United States of America in 1810 contested this principle. In that year, during war between Great Britain and Denmark, many

<sup>1</sup> *The Maria* (1799) 1 C. Rob. 340.

<sup>2</sup> See also *The Hawlyst* (1919), *Entscheidungen*, ii. 237, where the captain escaped from the ship with the papers, and her seizure and subsequent destruction were confirmed by the German Prize Court. Another unsettled question is whether the crew can be punished as 'war criminals' for resorting to armed resistance; Schramm, *Das Prisenrecht* (1913), p. 358, holds that they may be.

<sup>3</sup> See *Kyriakides v. Germany* (Greco-

German Mixed Arbitral Tribunal); *Annual Digest*, 1927-1928, Case No. 387. But see the Opinion of Parker, Umpire, in the case of *The Motano* for a possible qualification of this rule: United States-Germany Mixed Claims Commission, *A.J.*, xviii. (1924) p. 624; *Annual Digest*, 1923-1924, Case No. 221. See also Willms-Bonn in *Strupp*, *Wört.*, iii. pp. 949-954; Stödter, *Flottengebiet im Seekrieg* (1936); Gordon in *R.I.*, 3rd ser., xvii. (1936) pp. 165-196; *Harvard Research* (1939), pp. 674-680.

American vessels sailing from Russia used to seek protection under the convoy of British men-of-war, whereupon Denmark declared all such American vessels to be good and lawful prizes. Several were captured without making any resistance whatever, and were condemned by Danish Prize Courts. The United States protested, and claimed indemnities from Denmark, and in 1830 a treaty between the parties was signed at Copenhagen,<sup>1</sup> according to which Denmark had to pay 650,000 dollars as compensation. But Article 5 of this treaty expressly declared that 'the present convention is only applicable to the cases therein mentioned, and, having no other object, may never hereafter be invoked by one party or the other as a precedent or a rule for the future.'<sup>2</sup>

Article 63 of the Declaration of London did not define the term 'forcible resistance.'

§ 425. Since Great Britain does not recognise the right of Resist-  
convoy, and has always insisted upon the right to visit an-  
neutral merchantmen sailing under the convoy of neutral Neutral  
men-of-war, the question has arisen whether such merchant-  
men are regarded as resisting visitation in case the convoy-  
ing men-of-war only, and not the convoyed vessels them-  
selves, offer resistance. British practice has answered the  
question in the affirmative. The rule was laid down in 1799<sup>3</sup>  
and in 1804<sup>4</sup> by Sir William Scott in the cases of Swedish  
vessels captured while sailing under the convoy of a Swedish  
man-of-war.

<sup>1</sup> Martens, *N.R.*, viii. p. 350.

<sup>2</sup> See Wheaton, §§ 530-537; Taylor, § 693, p. 790; and Hyde, ii. § 735. Wheaton was the negotiator of this treaty on the part of the United States. With the case of neutral merchantmen sailing under enemy convoy, the other case—see above, § 185—in which neutral goods are placed on board an armed enemy vessel is frequently confused. In the case of *The Fanny* (1814) 1 Dod. 443, Sir William Scott condemned neutral Portuguese property on the ground that placing neutral property on board an armed vessel was equal to resistance against visitation. But the Supreme Court of the United

States of America, in the case of *The Nereide* (1815) 9 Cranch 388, held the contrary view. The court was composed of five judges, of whom Story was one, and the latter dissented from the majority and considered the British practice correct. See Phillimore, iii. § 341; Wheaton, § 529; Smith, *The Destruction of Merchant-ships* (1917), pp. 58-61.

<sup>3</sup> *The Maria* (1799) 1 C. Rob. 340.

<sup>4</sup> *The Elseebe* (1804) 5 C. Rob. 173. But see Deak and Jessup in *University of Pennsylvania Law Review*, 82 (1934), p. 21, n. 81 (off-print) for an earlier English decision to the contrary.

Had the Declaration of London been ratified, under Articles 61 and 62, which recognise the right of convoy, resistance by a neutral convoy to visitation could not, under ordinary circumstances, have been considered to be resistance on the part of the convoyed neutral merchantman. If, however, the commander of a convoy, after having refused to give the written information mentioned in Article 61 or to allow the investigation mentioned in Article 62, forcibly resisted visitation of the convoyed merchantman by a belligerent cruiser, the question whether resistance by a convoy was equivalent to resistance by a convoyed vessel would still have arisen.

Deficiency of Papers.

§ 426. The purpose of visit is to ascertain the nationality of a vessel, the character of her cargo and passengers, and the ports from and to which she is sailing, and it is obvious that this purpose cannot be realised in case the visited vessel is deficient in her papers. As stated above,<sup>1</sup> every merchantman ought to carry the following papers: (1) a certificate of registry or a sea-letter (passport); (2) the muster-roll; (3) the log-book; (4) the manifest of cargo; (5) bills of lading; and (6) if chartered, the charter-party. Now, if a vessel is visited, and cannot produce one or more of the papers mentioned, she is suspect. Search is, of course, admissible for the purpose of verifying the suspicion; but it may be that search, while not producing any proof of guilt, does not dispel the suspicion. In such a case she may be seized and brought to a port for thorough examination. But, except in a case where she cannot produce either a certificate of registry or a sea-letter (passport), she ought not to be confiscated merely for deficiency in papers. Yet, if the cargo is also suspect, or if there are other circumstances which increase the suspicion, confiscation would be, I believe, in the discretion of the Prize Court.<sup>2</sup>

Spoliation, Defacement, and Concealment of Papers.

✓§ 427. Mere deficiency of papers does not arouse the same suspicion which a vessel incurs if she destroys<sup>3</sup> or throws overboard<sup>4</sup> any of her papers, defaces them or conceals

<sup>1</sup> Vol. i. § 262.

<sup>2</sup> See Hall, § 276; and below, § 428 (n.).

<sup>3</sup> *The Hunter* (1815) 1 Dod. 480.

<sup>4</sup> *The Ophelia* [1916] 2 A.C. 206; 2 B. and C.P.C. 150; and the French cases, *The Iro-Marou*, Fauchille, *Jur. fr.*, i. 277 and 323; *The Alfonso XIII.*, Fauchille, *Jur. fr.*, i. 354.

them, and, in particular, if she does any of these things when the visiting vessel comes in sight. Whatever her cargo may be, a vessel may at once be seized without further search so soon as it becomes apparent that spoliation, defacement, or concealment of papers has taken place. The practice of the several States has hitherto differed with regard to other consequences of spoliation, defacement, or concealment of papers; but confiscation is certainly admissible in case other circumstances increase the suspicion.<sup>1</sup>

§ 428. Very high suspicion is aroused if a visited vessel carries double papers, or false<sup>2</sup> papers, and she may certainly be seized. But the practice of the several States has differed with regard to the question whether confiscation is admissible on this ground alone. Whereas the practice of some States, for instance Russia and Spain, has answered the question in the affirmative, British<sup>3</sup> and American<sup>4</sup> practice has taken a more lenient view, and condemned such vessels only on a clear inference that the false or double papers were carried for the purpose of deceiving the belligerent by whom the capture was made, and not in other<sup>5</sup> cases.<sup>6</sup>

Double  
and False  
Papers.

<sup>1</sup> See *The Apollo* in *Calvo*, v. § 2989.

<sup>2</sup> *The Sarah* (1801) 3 C. Rob. 330; *The Ran* [1919] P. 317; 3 B. and C.P.C. 621.

<sup>3</sup> *The Eliza and Katy* (1805) 6 C. Rob. 192.

<sup>4</sup> *The St. Nicholas* (1816) 1 Wheaton 417.

<sup>5</sup> See Halleck, ii. p. 301; Hall, § 276; Taylor, § 690.

<sup>6</sup> The unratified Declaration of London did not mention double or false papers, but the Report of the Drafting Committee on Article 64 contained the following observations: 'It is perhaps useful to indicate certain cases in which the capture of a vessel would be justified, whatever might be the ultimate decision of the Prize Court. Notably, there is the case where some or all of the ship's papers have been thrown overboard, suppressed, or intentionally destroyed on the initiative of the master or one of the crew or passengers. There is in such case an element which will justify any suspicion and afford an excuse for

capturing the vessel, subject to the master's ability to account for his action before the Prize Court. Even if the court should accept the explanation given and should not find any reason for condemnation, the parties interested cannot hope to recover compensation.

'An analogous case would be that in which there were found on board two sets of papers, or false or forged papers, if this irregularity were connected with circumstances calculated to contribute to the capture of the vessel.

'It appeared sufficient that these cases in which there would be a reasonable excuse for the capture should be mentioned in the present Report, and should not be made the object of express provisions, since, otherwise, the mention of these two particular cases might have led to the supposition that they were the only cases in which a capture could be justified.' For several cases during the World War see Verzijl, § 693, and Colombos, §§ 244-248.



Call at an  
Enemy  
Port of a  
Vessel  
with a  
Neutral  
Destina-  
tion.

§ 428a. High suspicion is likewise aroused in case a ship with papers indicating a neutral destination proceeds to an enemy port. The practice formerly prevailing did not indeed admit capture and condemnation in such a case provided the vessel was not otherwise suspect. However, during the World War, in October 1914, the Allies laid down the following rule: 'A neutral vessel with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage.' The Maritime Rights Order in Council of July 7, 1916, contained a corresponding rule with regard to a neutral vessel carrying contraband.

## II

### CAPTURE

Hall, § 277—Westlake, ii. pp. 309-312—Lawrence, § 191—Phillimore, iii. §§ 361-364—Twiss, ii. §§ 166-184—Halleck, ii. pp. 389-422—Taylor, § 691—Hershey, Nos. 521-522—Moore, vii. §§ 1206-1214—Bluntschli, § 860—Heffter, §§ 171, 191, 192—Geffcken in *Holtzendorff*, iv. pp. 777-780—Rivier, ii. pp. 426-428—Nys, iii. pp. 695-710—Calvo, v. §§ 3004-3034—Fiore, iii. Nos. 1644-1657, and *Code*, Nos. 1901-1912—Martens, ii. § 126—Kleen, ii. §§ 203-218—Gessner, pp. 333-356—Boeck, Nos. 770-777—Dupuis, Nos. 253-281, and *Guerre*, Nos. 205-217—Bernsten, § 11—Schramm, §§ 14-15—Nippold, ii. § 35—Perels, § 55—Testa, pp. 243-244—Hautefeuille, iii. pp. 214-298—Holland, *Prize Law*, §§ 231-314—Keith's Wheaton, pp. 1144-1154—Fauchille, §§ 1408-1421, 1674-1691 (4)—Mégnhac-Lémonon, ii. pp. 503-519—Verzijl, §§ 697-780—Suarez, §§ 460-467—Hyde, ii. §§ 752-755, 757-759—Balladore Pallieri, pp. 294-312—Kunz, pp. 172-174—Colombos, §§ 235-251—U.S. Naval War Code, Articles 46-50—Atherley-Jones, *Commerce in War* (1907), pp. 361-646—Hirschmann, *Das internationale Prisenrecht* (1912), §§ 35-37—Wehberg, §§ 7 and 8—Garner, ii. §§ 474-493—Higgins in *Hague Recueil*, 1925 (i.), pp. 142-166. See also many of the monographs quoted above at the commencement of § 391; Bulmerincq's articles on *Le droit des prises maritimes* in *R.I.*, x.-xiii. (1878-1881); and the General Report presented to the Naval Conference of London on behalf of its Drafting Committee, Articles 48-54.

Grounds  
and  
Mode of  
Capture.

§ 429. It follows from what has already been said concerning blockade, contraband, unneutral service, and visitation, that capture may take place either because the vessel, or the

cargo, or both, are liable to confiscation, or because grave suspicion demands a further inquiry which can only be carried out in a port. Both cases are alike so far as all details of capture are concerned, and in the latter case Prize Courts may pronounce capture to have been justified, although no ground for confiscating either vessel or cargo has been detected.

The mode of capture is the same as in the case of capture of enemy vessels.<sup>1</sup>

§ 430. The effect of capture of neutral vessels is in every way different from the effect of capture of enemy vessels,<sup>2</sup> since the purpose of capture differs in these two cases. Effect of Capture. Enemy vessels are captured for the purpose of appropriating them in the exercise of the right of a belligerent to appropriate all enemy property found on the open sea, or in the maritime territorial belt of either belligerent. On the other hand, neutral merchantmen are captured for the purpose of confiscating vessel or cargo, or both, as punishment for certain special acts, the punishment being pronounced by a Prize Court after a thorough investigation into all the circumstances of the case. Therefore, although the effect of capture of a neutral vessel is that the vessel, and the persons and goods thereon, are placed under the captor's authority, her officers and crew never become prisoners of war. They may indeed be detained as witnesses for the trial of the vessel and cargo, but nothing stands in the way of releasing such of them as are not wanted for that purpose. As regards passengers, if any, they have to be released as soon as possible, with the exception of those enemy persons who may be made prisoners of war.<sup>3</sup>

Regarding the conduct of neutral vessels to a port of a Prize Court, whether captured by a belligerent cruiser or by

<sup>1</sup> See above, § 184. The 'Règlement international des prises maritimes,' adopted by the Institute of International Law at its meeting at Heidelberg in 1887, regulates capture in §§ 45-62; see *Annuaire*, ix. (1888) p. 218. That capture may take place on the high seas, or in the territorial waters of belligerents, but not in

neutral territorial waters, is a matter of course. If capture does take place in neutral territorial waters, it is not the owner of the vessel, but the neutral State, which can claim its release before the Prize Court. See above, § 362.

<sup>2</sup> See above, § 185.

<sup>3</sup> See above, § 117.

military aircraft, the same rules apply as in the case of the conduct of captured enemy vessels<sup>1</sup> to such port.<sup>2</sup>

Destruction of Neutral Prizes.

§ 431. That, as a rule, captured neutral vessels may not be sunk, burned, or otherwise destroyed, has always been universally recognised, just as that captured enemy merchantmen may not, as a rule, be destroyed.<sup>3</sup> But it has long been a moot question whether captured neutral vessels as well as captured enemy vessels might be destroyed in exceptional cases instead of being brought before a Prize Court. {British<sup>4</sup> practice did not, as regards her neutral owner, hold the captor justified in destroying a neutral vessel, however exceptional the case might have been, and however meritorious the destruction of the vessel from the point of view of the Government of the captor. For this reason, should a captor, from any motive whatever, have destroyed a neutral prize, full indemnities had to be paid to the owner, although, if brought into a port of a Prize Court, condemnation of vessel and cargo would have been pronounced beyond doubt.<sup>5</sup> The rule was that a neutral prize must be abandoned, if for any reason it could not be brought to a port of a Prize Court. But the practice of other States did not recognise this British rule. The question became of great importance in 1905, during the Russo-Japanese War, when Russian cruisers sank a number of

<sup>1</sup> See above, § 193.

<sup>2</sup> International Law does not prescribe the officer to whose custody a prize and her cargo must be committed pending adjudication by a Prize Court; but the marshal or other officer must exercise reasonable care in the exercise of that custody, and in default of such care he is liable for loss or damage resulting (*The New Sweden* [1922] 1 A.C. 229; 3 B. and C.P.C. 1000; *The Santa Catharina* (1919) 3 B. and C.P.C. 367). If he effects an insurance on the property committed to his charge, he does so voluntarily and on his own behalf, and cannot saddle the property with the cost (*The Südmark* (No. 2) [1918] A.C. at p. 484; 3 B. and C.P.C. at p. 80; *The Cairnmore*, *The Gunda* [1921] 1 A.C. 439; 3 B. and C.P.C. 797).

These principles were applied to goods detained under the Reprisals Order in Council of March 11, 1915 (*The New Sweden*, *supra*).

<sup>3</sup> See Smith, *The Destruction of Merchant-ships under International Law* (1917), pp. 78-101; Jansma and Bisschop in *Grotius Society*, iv. (1919) pp. 3-14; Rolin, §§ 1272-1281; Higgins, *op. cit.*, above, § 429.

<sup>4</sup> *The Acteon* (1815) 2 Dod. 48; *The Felicity* (1819) 2 Dod. 381; *The Leucade* (1855) Spinks 217. See Phillimore, iii. § 333; Twiss, ii. § 166; Hall, § 277; Holland, *Letters to 'The Times' upon War and Neutrality* (3rd ed., 1921), pp. 173-181; Garner in *A.J.*, x. (1916) pp. 12-41; *Harvard Research* (1939), pp. 559-576.

<sup>5</sup> As to the practice of Prize Courts in awarding damages in such cases see Verzijl, §§ 599-623.

British, German, and Danish vessels.<sup>1</sup> Russia paid damages to the owners of the vessels the capture of which her Prize Courts declared not to have been justified, but she refused to pay damages to the owners of the other vessels destroyed, because her Prize Courts considered them to have been justly captured.

The Declaration of London proposed to settle the matter by a compromise. Recognising that neutral prizes may not as a rule be destroyed, and admitting only one exception to the rule, it empowered the captor under certain circumstances and conditions to demand the handing over, or to proceed himself to the destruction, of contraband carried by a neutral prize which he was compelled to abandon.

According to Article 48, as a matter of principle, captured neutral vessels might not be destroyed, but had to be taken into a port of a Prize Court. However, Article 49 permitted, as an exception, the destruction of a captured neutral vessel which would have been liable to condemnation, if the taking of the vessel into a port of a Prize Court would have involved danger to the safety of the capturing cruiser, or to the success of the operations in which she was at the time of capture engaged.

According to these provisions, a neutral prize might no longer be destroyed because the captor could not spare a prize crew, or because a port of a Prize Court was too far distant, or the like. The only justification for destruction was to be danger to the captor or to his operations<sup>2</sup> at the time of capture. As regards the degree of danger required, Article 49 did not provide any clue. But considering that Article 51 spoke of an 'exceptional necessity,' it was to be hoped and expected that Prize Courts would give such an

<sup>1</sup> Reported in Hurst, i. pp. 21, 54, 96, 145, 166, 188, 226, 276.

<sup>2</sup> See *The Cysne* (award of June 1930, in an arbitration between Portugal and Germany), where Germany was absolved of responsibility on that ground. This was a case of destruction by a submarine. The arbitrator also attached importance to the fact that no prize crew could be spared: *Annual Digest*, 1929-1930, Case No. 287.

And see Article 1 of the Habana Convention of 1923 on Maritime Neutrality (see above, § 68), which provides, *inter alia*, that belligerent submarines must not render neutral vessels incapable of navigation before the crew and passengers have been placed in safety. 'If the submarine cannot capture the ship while observing these rules, it shall not have the right to continue the attack or to destroy the ship' (Article 1).

interpretation to Article 49 as would permit the sinking of neutral prizes in cases of absolute necessity only. Be that as it may, according to Article 49, only such neutral prizes might be sunk as would be liable to confiscation if brought before a Prize Court. Sinking of captured neutral vessels—apart from those which had acquired enemy character and might for this reason be sunk under the same conditions as enemy vessels—was, therefore, chiefly admitted under the exceptional circumstances mentioned in Article 49 in three <sup>1</sup> cases, namely: (1) when—see Article 40—the vessel carried contraband the value of which formed more than half the value of the cargo; (2) when a vessel had been captured for rendering those kinds of unneutral service which were enumerated by Article 45; (3) when—see Article 21—a vessel had been captured for breach of blockade. In no case in which she was not liable to confiscation might a neutral vessel under any circumstances or conditions be destroyed; she had always to be abandoned if the capturing cruiser could not take her into a port of a Prize Court.

However, these the Declaration of London has not been ratified, and is not therefore legally binding.

When a captor destroys a neutral prize, he must place in safety all persons found on the captured vessel, and he must take on board all the captured ship's papers which are relevant for the purpose of deciding the validity of the capture.<sup>2</sup>

Moreover, according to Article 51 of the unratified Declaration of London, if the captor failed to establish before the Prize Court that he destroyed the prize in the face of an exceptional necessity, the owners of the vessel and cargo had to receive full compensation without any examination of, or any regard to, the question whether the capture itself was justifiable. Compensation had likewise to be paid in case the capture was held by the Prize Court to be invalid, although the act of destruction was held to be justifiable

<sup>1</sup> As to cases in which a neutral vessel carried defective, spoiled, defaced, double, or false papers, see

above, §§ 426-428.

<sup>2</sup> See Article 50 of the unratified Declaration of London.

(Article 52). In any case, the owners of neutral goods<sup>1</sup> not liable to condemnation which had been destroyed with the vessel might always, and under all circumstances and conditions, claim damages (Article 53).

Thus many safeguards would have been established against arbitrariness in the destruction of neutral prizes. On the other hand, it seemed to be going too far to insist on the captor letting the prize go with her contraband on board, if he was compelled to abandon her. For this reason Article 54 empowered the captor of a neutral vessel herself not liable to confiscation to demand the handing over, or to proceed himself to the destruction,<sup>2</sup> of any goods liable to confiscation found on board, if the taking of the vessel into a port of a Prize Court would have involved danger to the captor, or to the success of the operations in which he was at the time of capture engaged.

However, the rules of the Declaration of London remained unratified, and during the World War the practice of the Central Powers was very different.<sup>3</sup>

§ 431a. During the World War, the Allied and Associated Powers refrained from destroying intentionally neutral ships. The Central Powers, on the other hand, are believed to have sunk no less than 1716.<sup>4</sup> In a few cases—such as those of the American vessels *Gulflight*, torpedoed on May 7, 1915, and *Nebraskan*, torpedoed on May 25, 1915—Germany admitted or claimed that a mistake had been made<sup>5</sup>; and in a few others—such as those of the *Draupner*, *Saga*, and *Asta*—the German Prize Court of Appeal, reversing the lower court, declared the destruction of the vessels to have been illegal, and compensated the owners. But in most cases the destruction of neutral vessels at sight without visit and

Destruction of Neutral Prizes during the World War.

<sup>1</sup> It has been asserted—see Schramm, pp. 515-516—that the owners of enemy goods, contraband excepted, may also claim compensation because, according to the Declaration of Paris, the neutral flag covers enemy goods. But it is doubtful if Prize Courts would recognise any such claim.

<sup>2</sup> Details concerning such destruction have been given above in § 406a (2).

<sup>3</sup> All rules concerning destruction of neutral prizes by belligerent cruisers apply also to destruction by belligerent military aircraft: see Spaight, *Air*, ch. xxii. (Aircraft Operations against Merchant Vessels). And see above, § 214g. As to the destruction of captured aircraft see Spaight, *Air*, pp. 405-409.

<sup>4</sup> Garner, ii. § 491.

<sup>5</sup> Garner, ii. § 484.

search, no provision, or no adequate provision, being made for the safety of passengers and crew, was upheld by the Central Powers, mainly on the ground (which their submarines did not stop to verify) that they were carrying contraband, and that to have brought them to a port of a Prize Court would have involved danger to the captor. Among the best-known cases are those of the American neutral vessel *William P. Frye*, sunk by the German cruiser *Prinz Eitel Friedrich*,<sup>1</sup> and the Dutch vessels *Maria* and *Medea*,<sup>2</sup> the sinking of which was upheld by the German Prize Courts.<sup>3</sup> But the torpedoing of neutral vessels at sight became a regular feature of German submarine warfare,<sup>4</sup> and no neutral maritime State was exempt. Over 2000 sailors are said to have been drowned. The same practice was followed by Germany in the war which broke out in 1939.

Ransom  
and Re-  
capture of  
Neutral  
Prizes.

§ 432. The rules relating to ransom of captured neutral vessels are the same as those concerning ransom of captured enemy vessels.<sup>5</sup>

As regards recapture of neutral prizes,<sup>6</sup> the rule ought to be that *ipso facto* by recapture, prior to condemnation, the vessel becomes free without payment of any salvage. Although captured, she was still the property of her neutral owners, and if condemnation had taken place at all, it would have been a punishment, and the recapturing belligerent has no interest whatever in the punishment of a neutral vessel by the enemy.

The practice of States is not uniform on the matter. Very few treaties touch upon it, and the municipal regulations of the different States regarding prizes seldom mention it.

<sup>1</sup> Garner, ii. § 485.

<sup>2</sup> Garner, ii. §§ 486-487.

<sup>3</sup> Neutral protests against the destruction of neutral merchantmen by the Central Powers were frequently based on the fact that the Declaration of London had not been ratified, so that destruction was illegal. For instance, the *Berkelstroom*, a Dutch vessel carrying contraband and sunk by a German submarine, was the subject of a diplomatic correspondence between Holland and Germany: see

*Entscheidungen*, i. 318; Eggers, *Der Berkelstroom-Fall* (1921); and in *Strupp, Wört.*, i. pp. 129-130.

<sup>4</sup> Verzijl, §§ 740-743; Garner, ii. § 491.

<sup>5</sup> See above, § 195.

<sup>6</sup> See Hautefeuille, iii. pp. 369-407; Gessner, pp. 344-356; Kleen, ii. § 217; Geffcken in *Holtzendorff*, iv. pp. 778-780; Calvo, v. §§ 3210-3126; Rolin, §§ 1303-1315; Colombo, §§ 264-271.

According to British practice, the recaptor of a neutral prize is entitled to salvage when the recaptured vessel would have been liable to condemnation if brought into an enemy port, or when the enemy Prize Court, if the vessel had been destroyed by the captor, would have considered her destruction justifiable.<sup>1</sup> But the right to salvage, even if thus limited, does not take into account the fact that it is not in the interest of the belligerent to exact from the neutral owners payments of this nature. For this reason, although recent British decisions uphold the right to salvage as part of the law, there has been a tendency to keep at a low level the amounts awarded.<sup>2</sup>

§ 433. Besides the case in which captured vessels must be abandoned, because they cannot for some reason or another be brought into a port, there are cases in which they are released without trial. The rule is that a captured neutral vessel is to be tried by a Prize Court in case the captor asserts her to be suspicious or guilty. But it may happen that all suspicion is dispelled even before the trial; and then the vessel is to be released at once.<sup>3</sup> Even after she has been brought into the port of a Prize Court, release may take place without trial. Thus the German vessels *Bundesrath* and *Herzog*, which were captured in 1900 during the South African War and taken to Durban, were, after search had dispelled all suspicion, released without trial.<sup>4</sup>

That the released vessel may claim damages is a matter of course.<sup>5</sup>

<sup>1</sup> *The War Onskan* (1799) 2 C. Rob. 299. See also Holland, *Prize Law*, § 270. But France adhered to her old 'rule of twenty-four hours' (see Fauchille, §§ 1416-1421); see *The Pluto* in R.G., xxviii. (1921), *Jurisprudence*, p. 3, a Norwegian vessel captured by German naval forces, condemned by the Hamburg Prize Court in 1917, recaptured by French naval forces in the Baltic in 1919; France declined to accede to the demand of the Norwegian Government for restitution. Some difficult questions connected with the effect of recapture arose in a number of cases which came before the Belgian Conseil

des Prises in 1919: upon which see Higgins in B.Y., 1921-1922, pp. 180-192; Ch. de Visscher in R.I., 3rd ser., i. (1920) pp. 228-238 and 271-292; Clunet in 48 *Clunet* (1921), pp. 83-92; A.J., xviii. (1922) pp. 117-142; Verzijl, §§ 763-777.

<sup>2</sup> Compare *The Pontoporus* (1915) 1 B. and C.P.C. 371; (1916) 2 B. and C.P.C. 87; [1916] P. 100, and *The Svanfos* [1919] P. 189; 3 B. and C.P.C. 470.

<sup>3</sup> See Holland, *Prize Law*, § 246.

<sup>4</sup> See above, § 402.

<sup>5</sup> See Article 64 of the unratified Declaration of London, and Verzijl, §§ 578-583. See below, § 435.

Release  
after  
Capture.



## III

## TRIAL OF CAPTURED NEUTRAL VESSELS

Lawrence, §§ 188-190—Maine, p. 96—Manning, pp. 472-483—Phillimore, iii. §§ 433-508—Twiss, ii. §§ 169-170—Halleck, ii. pp. 423-464—Taylor, §§ 563-567—Wharton, iii. §§ 328-330—Hershey, Nos. 523-524—Moore, vii. §§ 1222-1248—Wheaton, §§ 389-397—Bluntschli, §§ 841-862—Heffter, §§ 172-173—Geffcken in *Holtzendorff*, iv. pp. 781-788—Ullmann, § 196—Fauchille, §§ 1676-1691—Despagnet, Nos. 677-682 *bis*—Rivier, ii. pp. 353-356—Nys, iii. pp. 711-736—Calvo, v. §§ 3035-3087—Fiore, iii. Nos. 1681-1691, and *Code*, Nos. 1913-1952—Martens, ii. §§ 125-126—Kleen, ii. §§ 219-234—Gessner, pp. 357-426—Boeck, Nos. 740-800—Dupuis, Nos. 282-301, and *Guerre*, Nos. 218-223—Nippold, ii. § 35—Perels, §§ 56-57—Schramm, § 17—Hautefeuille, iii. pp. 299-369—Verzijl, §§ 6-30, 42-69, 96-127, 578-671—Suarez, §§ 473-477—Gemma, pp. 389-391—Hyde, ii. §§ 890-903—Kunz, pp. 179-190—Genet, §§ 317-370—Atherley-Jones, *Commerce in War* (1907), pp. 361-594—Hirschmann, *Das internationale Prisenrecht* (1912), § 38—Wehberg, § 9—Colombos, §§ 281-305—Garner, *Prize Law*, Nos. 1-138—Keith's *Wheaton*, pp. 1162-1189—Butler and Maccoby, *The Development of International Law* (1928), pp. 311-320—Reuter, *Étude de la règle 'Toute prise doit être jugée'* (1933)—Jessup and Deák, *Neutrality*, vol. i., *Origins* (1935), pp. 157-248—Bulmerincq's articles on *Le droit des prises maritimes* in *R.I.*, x.-xiii. (1878-1881)—Pyke in the *Law Quarterly Review*, xxxii. (1916) pp. 144, 167—Ch. de Visscher in *R.G.*, xxvii. (1920) pp. 29-39—Lord Merrivale (Sir Henry Duke) in *Grotius Society*, vi. (1921) pp. 99-106—*Harvard Research* (1939), pp. 619-653. See also the monographs quoted above at the commencement of § 391.

Trial of  
Captured  
Vessels a  
Municipal  
Matter.

§ 434. Although belligerents have, in certain circumstances, according to International Law, the right to capture neutral vessels, and although they have the duty to bring these vessels for trial before a Prize Court, such trials are not an international matter. Just as Prize Courts are municipal<sup>1</sup>

<sup>1</sup> See above, § 192. The matter is regulated, so far as Great Britain is concerned, by the Naval Prize Act, 1864 (27 & 28 Vict. c. 25); the Prize Courts Act, 1894 (57 & 58 Vict. c. 39); the Prize Courts (Procedure) Act, 1914 (4 & 5 Geo. V. c. 13); the Prize Court Rules, 1914; the Prize Court Act, 1915 (5 & 6 Geo. V. c. 57); the Naval Prize (Procedure) Act, 1916 (6 Geo. V. c. 2); the Naval Prize Act, 1918 (8 & 9 Geo. V. c. 30); Prize Act, 1939 (2 & 3 Geo. VI. c. 65); the Prize Court Rules, 1939. As to the latter see Parry in *Modern Law Review*, iii. (1940) pp. 298-302. The 'Règlement international des prises

maritimes,' adopted in 1887 at Heidelberg by the Institute of International Law, suggested in §§ 63-118 detailed rules concerning the organisation of Prize Courts and the procedure before them; see *Annuaire*, ix. (1888) p. 218. The German Prize Rules of 1914 are printed in Genet, ii. pp. 573-601. A new German Prize Ordinance was issued in 1939: Eckhard and Schenk von Stauffenberg, *Prisenordnung und Prisengerichtsordnung* (1939). See also Genet, pp. 624-626 as to the French *Instructions* of 1934. For an exhaustive collection of Prize Regulations see Defert, Lainé, and Gidel, *Prises maritimes* (1940).

institutions, so trials of captured neutral vessels by these Prize Courts are municipal matters. The neutral home States of the vessels are not represented, and are not, directly at any rate, concerned in the trial. In most countries, when war breaks out, the Governments draw up a body of prize rules which the Prize Courts have to apply; and although these rules are supposed to be in conformity with International Law, the Prize Courts cannot go back upon them if in fact they are not.<sup>1</sup> British judges and writers, however, have frequently expressed the view that Prize Courts are international courts, and that the law administered by them is International Law. Lord Stowell again and again<sup>2</sup> emphatically asserted it, and the vast majority of English and American writers<sup>3</sup> followed him. Indeed, although during the World War the British Prize

<sup>1</sup> See the judgment of the German Prize Court in *The Elida, Z.V.*, ix. (1915) p. 109: 'For judging the legality of acts in connection with prize law by the prize courts, general international principles can . . . apply only in so far as the prize regulations do not contain any provisions, and consequently refer tacitly to the principles of International Law. The question itself as to whether any provision of the prize regulations is in harmony with general international principles must therefore be eliminated from the decisions of the prize courts'; and in Fauchille, *Jur. all.*, p. 8. See also *The Batavier* and *The Zaanstroom* in Fauchille, *Jur. all.*, pp. 90 and 97. The author of this book emphatically adopted this view of the nature of Prize Courts for the reasons mainly (a) that International Law can be binding directly upon States only and not upon their organs, including courts (see vol. i. §§ 20-25); (b) that the practice of various Prize Courts differs on many points. As to (b) it will be noted that municipal tribunals hold in some cases divergent views on such subjects as the extent of diplomatic immunities or jurisdictional immunities of foreign States, but this does not mean that in these matters they do not apply International Law; it merely means that International Law is in such cases

variously interpreted by courts of various States. See the commission issued to the British Prize Court, cited in *Netherlands-American Steam Navigation Co. v. H.M. Procurator-General* [1926] 1 K.B. at p. 93 (cited above, § 192 (n.)). For the prize regulations of other States see Verzijl, §§ 70-78 and Colombos, §§ 18-27.

<sup>2</sup> *The Maria* (1799) 1 C. Rob. 340; *The Recovery* (1807) 6 C. Rob. 341; *The Fox* (1811) Edwards 311.

<sup>3</sup> See, for instance, Halleck, ii. pp. 442-443; Manning, p. 472; Phillimore, iii. §§ 433-436; Hall, § 277. But see, on the other hand, Holland, *Studies*, p. 196; Westlake, ii. pp. 317-318; Scott, *Conferences*, p. 467; Maine, p. 96; Pyke in the *Law Quarterly Review*, xxxii. (1916) pp. 144-167. And see Garner, *Prize Law*, Nos. 126-138. Contrast the view expressed by the Hamburg Prize Court in *The Zaanstroom*, Fauchille, *Jur. all.*, p. 97 (see Bellot in *Journal of Comparative Legislation*, 3rd ser., i. pt. 1 (1919), pp. 3-6). The Italian War Law of 1935 (see above, p. 181) lays down expressly that 'the prize court applies the internal law of the state,' but adds that 'when a controversy cannot be decided by a definite rule of internal law' or by analogy, 'recourse is to be had to generally recognised international usages.'

Court of Appeal, the Privy Council, recognised<sup>1</sup> that Prize Courts are municipal courts, it still asserted that they administer International Law; and in a later case the Prize Court was again called 'an international tribunal.'<sup>2</sup> However that may be, there is no doubt that a British Prize Court, being a municipal tribunal, would be bound to apply an Act of Parliament inconsistent with the Law of Nations. But then, as the court said in *The Zamora*, the Prize Court 'would no longer be administering International Law,' and it would to that extent 'be deprived of its proper function as a Prize Court.'<sup>3</sup>

As regards the procedure in Prize Courts, no general rules of International Law exist as yet<sup>4</sup>; and so every State settles the matter according to discretion. But of course a fair hearing must be accorded to all claims. The procedure in Prize Courts cannot be compared with the procedure in civil or criminal courts, for in Prize Courts the burden of proof is in practice everywhere laid upon the owner of the captured vessel or cargo. Everywhere in the first instance, no doubt, evidence must come from the ship's papers and the depositions of the master and officers—'out of the vessel's

<sup>1</sup> *The Zamora* [1916] 2 A.C. at p. 91; 2 B. and C.P.C. 1 at p. 12. The judgment in this case is of the greatest importance, because it lays down the principle that British Prize Courts are not bound by Orders in Council which are contrary to International Law, unless they amount to a mitigation of the rights of the Crown in favour of the enemy or a neutral, or authorise reprisals justified by the circumstances of the case and not entailing upon neutrals a degree of unreasonable inconvenience. See above, § 319; *The Alwina* [1918] A.C. at p. 450; 3 B. and C.P.C. 54 at p. 58; *The Proton* [1918] A.C. 579; 3 B. and C.P.C. 125; *The Oscar II.* [1920] A.C. 748; 3 B. and C.P.C. 588; and *The Consul Corfitzon* [1917] A.C. at pp. 555-556; 3 B. and C.P.C. at pp. 12, 13.

As to the exclusive character of the jurisdiction of a British Prize Court and of the American Federal Courts in matters connected with

prize see *Le Caux v. Eden* (1781) 2 Doug. 594; *Lindo v. Rodney* (1782), *ibid.*, 613 (n.); *Novion v. Hallett* (1819) 16 John (N.Y.) 327; Scott, *Cases*, 1044; *Netherlands-American Steam Navigation Co. v. H.M. Procurator-General* [1926] 1 K.B. 84.

As to the jurisdiction of a British Prize Court in matters incidental to prize see *The Corsican Prince* [1916] P. 195; 1 B. and C.P.C. 178; *The St. Helena* [1916] 2 A.C. 625; 2 B. and C.P.C. 257; *Egyptian Bonded Warehouses Limited v. Yeyasu Goshi Kaisha* [1922] 1 A.C. 111; 3 B. and C.P.C. 1023.

<sup>2</sup> *The Kronprinzessin Victoria* [1919] A.C. at p. 268; 3 B. and C.P.C. 247 at p. 254.

<sup>3</sup> *Supra.*

<sup>4</sup> For a presentation of the procedure in different Prize Courts see Verzijl, §§ 96-115, and Garner, *Prize Law*, Nos. 70-102.

own mouth'; but other evidence is also admitted in practice,<sup>1</sup> and it could not be otherwise without keeping the door wide open to deceit. In a British Prize Court the Statutes of Limitation, which bar the institution of proceedings after the lapse of certain periods of years, have no application; nevertheless, the court appears to reserve an equitable discretion to decline to entertain stale claims.<sup>2</sup>

§ 435. The trial of a captured neutral ship can have one or more of the following results: (1) vessel and cargo may be condemned,<sup>3</sup> or (2) the vessel alone may be condemned, or (3) the cargo alone may be condemned, or the vessel and cargo may be released either (4) with, or (5) without, costs and damages, or (6) subject to the payment of the captor's costs of the proceedings.<sup>4</sup> Costs and damages must be allowed when capture was not justified.<sup>5</sup>

But capture may be justified, as, for instance, in the case of spoliation of papers,<sup>6</sup> or by the existence of suspicious

<sup>1</sup> See Pyke in the *Law Quarterly Review*, xxxii. (1916) p. 56; Verzijl, §§ 471-477; and Garner in *A.J.*, xxv. (1931) pp. 28-32. But see Baty, *The Canons of International Law* (1930), pp. 283-289, and in *A.J.*, xxv. (1931) pp. 627, 628, for a spirited defence of the exclusion of captor's evidence. And see Jessup and Deak, *op. cit.*, pp. 170-188, showing that English practice admitted extrinsic evidence as far back as the eighteenth century in cases where the papers were defective.

<sup>2</sup> *The Mentor* (1799) 1 C. Rob. 175; *The Huldah* (1801) 3 C. Rob. 235; *The Susanna* (1805) 6 C. Rob. 48; *The Wilhelmina* [1923] F. 112; and cases cited, *ibid.*, at p. 120.

<sup>3</sup> It would seem to be obvious that condemnation of the vessel involves the loss of the vessel at the date of capture; see *Andersen v. Marten* [1908] A.C. 334. See also *The Odessa* [1916] 1 A.C. at p. 153, and 1 B. and C.P.C. at p. 559: 'The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure.' Contrast the project of the Institute of International Law in *Annuaire*, ix. (1888) p. 218.

<sup>4</sup> I.e. in respect of those proceedings, but not in respect of other proceedings in which the same party was claimant, *The Oranje Nassau* [1921] P. 190; 3 B. and C.P.C. 915. See also *The Oscar II.* [1919] P. 171; [1920] A.C. 748; 3 B. and C.P.C. 421, 588; 'when the Crown, by the Procurator-General, takes the benefit of a seizure which has been made, and institutes proceedings against goods, or a ship, in respect of that seizure, instead of the proceedings which used to be taken by the actual captor, it puts itself in the position of that actual captor for all purposes'—[1919] P. at p. 180; 3 B. and C.P.C. at p. 430.

<sup>5</sup> As to the practice of Prize Courts in regard to damages in this and other cases see Verzijl, §§ 581-671; Colombos, §§ 245-248; and Garner, *Prize Law*, Nos. 464-497. As to the payment of freight for the carriage of confiscated contraband cargoes see above, § 405. See also Garner, *Prize Law*, Nos. 476-482, on claims of the captor against the owner of innocent goods carried on ships condemned as good prize, and on other claims in regard to freight.

<sup>6</sup> See above, § 427.

circumstances,<sup>1</sup> although the Prize Court does not condemn the vessel, and in that case costs and damages will not be awarded; further, costs and damages are never allowed if even a part of the cargo is condemned, although the vessel herself and the greater part of the cargo are released.<sup>2</sup>

Trial of  
Captured  
Aircraft.

§ 435a. In the absence of special distinguishing considerations it seems probable that the rules of maritime prize law will be made applicable to captures of and by aircraft. Article 55 of the Hague Air Warfare Rules provided that captured aircraft and their cargoes shall be made the subject of prize proceedings, in order that neutral claims may be duly heard and determined. The British Prize Act, 1939,<sup>3</sup> lays down that, subject to some slight exceptions,<sup>4</sup> the law relating to prize shall apply in relation to aircraft and goods carried therein as it applies in relation to ships and goods carried therein. It is expressly stated that prize law shall apply notwithstanding that the aircraft is on or over land.<sup>5</sup>

Trial  
after Con-  
clusion of  
Peace.

§ 436. Prior to the World War, it was a moot question whether neutral vessels captured before the conclusion of peace might be tried after the conclusion of peace.<sup>6</sup> The

<sup>1</sup> *The Ostsee* (1855) 9 Moore P.C. 150; *The Baron Stjernblad* [1918] A.C. 173; 3 B. and C.P.C. 17; *The Kronprins Gustav Adolf and Other Vessels* (1917) 2 B. and C.P.C. 418; *The Edna* [1921] 1 A.C. 735; 3 B. and C.P.C. 926; *The Falk and Other Ships* [1921] 1 A.C. 787; 3 B. and C.P.C. 955; a French case, *The Rioja*, Fauchille, *Jur. fr.*, i. 141; German cases, *The Artemis* in *Z.L.*, xxvi. (1916) 591; *The Mjölner*, Fauchille, *Jur. all.*, 320; *The Thorsten*, *ibid.*, 192. Possibly an honest mistake of fact on the part of the captor is also a ground for refusing costs and damages to the neutral shipowner: *The Düsseldorf* [1920] A.C. 1034; 3 B. and C.P.C. 664 (a case of unintentional violation of neutrality in capturing an enemy vessel).

<sup>2</sup> A good deal of information upon claims for damages by neutral subjects upon a belligerent will be found in the *French Spoilation Claims* before the American Court of Claims, the American Government having assumed the liability of the French Govern-

ment, to a certain extent, to indemnify American citizens for injuries by France as a belligerent: see Toelle in *Michigan Law Review*, xxiv. (1926) pp. 675-679. And see Garner, *Prize Law*, Nos. 486-497, on the measure of damages in claims for indemnity.

<sup>3</sup> 2 & 3 Geo. VI. c. 65. Article 279 of the Italian War Regulations of 1938 contains an identical provision.

<sup>4</sup> These exceptions to the provisions of the Naval Prize Act, 1864, are specified in Part II. of the Act. They refer to minor matters like joint captures, bounty, and ransom.

<sup>5</sup> § 1.

<sup>6</sup> See Perels, § 57, p. 309, Wehberg, p. 58, and Borchard, § 100, in contradistinction to Bluntschli, § 869. But there is, of course, no doubt that a belligerent can exercise an act of grace and release such prizes. Thus, in November 1905, at the end of the Russo-Japanese War, the Mikado proclaimed the unconditional release of all neutral prizes captured after the signing but before the ratification of the Peace of Portsmouth.

correct answer must probably be in the affirmative, even if a special clause was contained in the Treaty of Peace<sup>1</sup>, which stipulated that vessels of the belligerents captured but not yet condemned should be released. A trial of neutral prizes is in any case necessary for the purpose of deciding whether capture was justified or not, and if not, whether costs and indemnities should be awarded to the owners. Thus, after the conclusion of the Abyssinian War, in December 1896, the Italian Prize Commission, in the case of the *Doelwijk*,<sup>1</sup> claimed the right to try the vessel in spite of the fact that peace had been concluded between the time of capture and trial, and declared the capture of the vessel and cargo to have been justified; but it pronounced that, peace having been concluded, confiscation of vessel and cargo would no longer be lawful.

Different, however, from the question whether neutral prizes might be tried after the conclusion of peace was the question whether they might be condemned and confiscated. In the above-mentioned case of the *Doelwijk* the latter question was answered in the negative, but the author believed that it ought to have been answered in the affirmative.<sup>2</sup> Confiscation of vessel and cargo having the character of a punishment, it seemed to him that the punishment might be inflicted after the conclusion of peace provided the offence was consummated before peace was concluded. But nothing, of course, stood in the way of a belligerent taking a more lenient view, and ordering his Prize Courts not to pronounce confiscation of neutral vessels after the conclusion of peace.<sup>3</sup>

Thereby, three German vessels, two English, and one Norwegian escaped confiscation, which in strict law—see above, § 415 (n.)—would have been justified.

<sup>1</sup> See Martens, *N.R.G.*, 2nd ser., xxviii. pp. 66-90, and Diena in 24 *Clunet* (1897), pp. 268-297. See also above, § 403.

<sup>2</sup> After the conclusion of the Russo-Japanese War, in November 1905 and February 1906, the Japanese Prize Courts condemned two American vessels, the *Australia* and the *Montara*, which had been captured shortly before the conclusion of peace (Hurst, ii. pp. 373, 403).

<sup>3</sup> At the end of the World War, the opinion expressed in the text was confirmed, at any rate so far as British practice is concerned, since in March 1920, after the Treaty of Peace with Germany had come into force, the *Rannveig*, a Norwegian vessel, captured on March 6, 1919, for carrying a full cargo of contraband to a German base of supply during the armistice, was condemned by the British Prize Court: [1920] P. 177; [1922] 1 A.C. 97; 3 B. and C.P.C. 740, 1013. See also *The Twee Ambt* [1920] P. 413; 3 B. and C.P.C. 730 (trial after treaty of peace came into force; no condemnation, but no objection taken

Protests  
and  
Claims of  
Neutrals  
after  
Trial.

§ 437. If a trial leads to condemnation, and if, in the event of an appeal, the condemnation is affirmed, the matter, as between the captor and the owner of the captured vessel and cargo, is finally settled.<sup>1</sup> But the right of protection,<sup>2</sup> which a State exercises over its subjects and their property abroad, may nevertheless give rise to diplomatic protests and claims on the part of the neutral home State of a condemned vessel or cargo, in case the verdict of the Prize Court is considered to be not in accordance with International Law, or formally or materially unjust. It is through such protests and claims that the matter, which was hitherto a mere municipal one, becomes of *international* importance.<sup>3</sup>

Proposals  
for Inter-  
national  
Prize  
Courts.

§§ 438-447. A desire to avoid diplomatic controversy of the nature referred to in the preceding section between neutrals and belligerents has given rise from time to time to proposals for the establishment either of Prize Courts containing a neutral element, or of an International Prize Court to which appeals would lie from the national Prize Courts. This movement culminated in Hague Convention XII. of 1907, whereby it was proposed to create an Inter-

on the ground of peace); and French cases, *The Almazora*, R.G. xxvii. (1920), *Jurisprudence*, pp. 18 and 72; *The Möwe*, *ibid.*, p. 81; *The Meta*, *ibid.*, p. 88; *The Peter Rickmers*, *ibid.*, p. 99, and many others; and a German case, *The Atlas*, *Entscheidungen*, ii. 321, and, on appeal, *Grotius Annuaire*, 1924, p. 252. See Verzijl, §§ 134-136, who cites many of the above-mentioned cases.

<sup>1</sup> See above, p. 369.

<sup>2</sup> See above, vol. i. § 319.

<sup>3</sup> History records many cases in which neutral States have intervened after trials of vessels which had sailed under their flags. Thus, for instance, in the famous case of the Silesian loan (see above, § 37) it was because Frederick II. of Prussia considered the procedure of British Prize Courts regarding a number of Prussian merchantmen captured during war between Great Britain and France in 1747 and 1748 as unjust, that in 1752 he resorted to reprisal and sequestered the payments of the interest on the Silesian loan. The

matter was settled (see Martens, *Causes célèbres*, ii. p. 167, and Satow, *The Silesian Loan and Frederick the Great* (1915)) in 1758, through the payment of £20,000 as indemnity by Great Britain. The treaty which constitutes the origin of modern arbitration, namely, the Jay Treaty of 1794 between Great Britain and the United States, provided in Article VII. for arbitral determination of claims of this nature. See Moore, *International Adjudications*, iv. (1931), and see above, p. 369 (n.). Again, after the American Civil War, Articles 12-17 of the Treaty of Washington (see Martens, *N.R.G.*, xx. p. 698, and Satow, *op. cit.*, p. 198) provided that three commissioners should be appointed for the purpose, amongst others, of deciding all claims against verdicts of the American Prize Courts. Again, when in 1879, during war between Peru and Chile, the German vessel *Luxor* was condemned by the Peruvian courts, Germany interposed and the vessel was released (see above, § 404).

national Prize Court. In order that it should operate effectively it was considered necessary that an agreed code of naval prize law should be enacted, and for this purpose a Naval Conference met in London in 1908 and 1909, and produced the Declaration of London. The failure of this Declaration to secure ratification was regarded as fatal to the proposal for an International Prize Court, and accordingly Hague Convention XII. has remained unratified. The Permanent Court of International Justice,<sup>1</sup> established in 1921, is competent to deal with disputes as to any question of International Law, including prize law, if the parties have bound themselves in advance<sup>2</sup> to bring their disputes before the Court, or agree to do so *ad hoc*.<sup>3</sup> However, in view of the unsettled state of prize law, it is doubtful whether it is desirable to entrust the Court with compulsory jurisdiction in matters of prize.

<sup>1</sup> See above, §§ 25ab-25ag. It was in fact suggested in connection with the event of a League blockade that an appeal should lie from national Prize Courts to the Permanent Court: *Second Assembly, Meetings of Committees*, i. p. 301. See also Borchard in *Iowa Law Review*, xix. (1934) p. 175.

<sup>2</sup> Article 36 of the Statute. In 1920, during the discussion upon the 'Protocol for the Pacific Settlement of International Disputes' (popularly known as the 'Geneva Protocol'), the British Government announced that in pursuance of the liberty given by Article 3 of that document they would, if they adopted the compulsory jurisdiction, reserve from it disputes arising out of the operations of the British Fleet in time of war owing to the lack of agreement upon many important points of prize law: see above, § 25ae, and below, § 447a. The Geneva Protocol was not ratified: see above, § 25d (n.). However, when adhering in 1929 to the Optional Clause of Article 36 of the Statute of the Court, the British Government deliberately refrained from reserving matters of prize law on the ground, which was controversial already at that time (see above, § 292a), that as between members of the League there will in the future be no neutrals (Misc. No. 12 [1929] Cmd. 3452). As to the

unilateral suspension of the operation of the Optional Clause by the British and French Governments, in September 1939, with regard to matters arising out of the conduct of the war see above, p. 56. Possible claims arising out of the conduct of the World War by Great Britain were, however, effectively excluded in 1929 by the reservation as to past disputes (see above, § 25ae). And see below, § 447a.

<sup>3</sup> Sections 438 to 447, in which different proposals for an International Prize Court were examined with reference to the text of Hague Convention XII., will be found in the third edition of this work. Much of the language used in the Statute of the Permanent Court of International Justice is reminiscent of the unratified Hague Convention XII., so that the labour bestowed upon it has not been in vain. To the literature cited in §§ 438-447 of the third edition may be added the following: Hyde, ii. §§ 504, 896; Fauchille, §§ 1440 (1)-1440 (3), 1691 (1); Liszt, § 66 B, iv.; De Louter, ii. pp. 494-509; Suarez, §§ 468-472; Pohl in *Strupp, Wört.*, ii. 308-314; Colombos, §§ 306-338, and in the *Thirtieth Report of International Law Association*, i. (1922) pp. 29-42; Hudson, *Permanent Court*, pp. 68-76.



International  
Tribunals  
and  
Present  
Position of  
Prize  
Law.

§ 447a. The question whether the Permanent Court of International Justice is by its Statute enabled to decide on disputes concerning prize law must not be confused with the question whether it is desirable that it should act in that capacity, in particular in pursuance of clauses conferring upon it compulsory jurisdiction. This latter question must, it is believed, be answered in the negative.<sup>1</sup> The Court is bound to decide every problem of International Law put before it by the parties, regardless of the state of the law on the matter. But it is of importance for the administration of international justice that decisions of international tribunals should as a rule be based on recognised principles and provisions of law. Now it must be clear to the reader of this volume, in particular in the light of the problems and controversies raised by the World War, that there is at present no generally agreed prize law in regard to some of its most important aspects. The controversy as to the legality or otherwise of the conduct of war in this sphere by the Allied Powers is still raging.<sup>2</sup> The various Governments have since maintained their respective, and widely divergent, positions.<sup>3</sup> It would not therefore, it is believed, be consistent with the function of an impartial science of International Law to maintain that there exists at present a working body of generally agreed rules of prize law, in particular in its bearing upon the rights and duties of neutrals. Historically prize law has been, in this matter, a compromise

<sup>1</sup> The editor has elsewhere stated, in some detail, the reasons why it is undesirable to confer upon the Permanent Court obligatory jurisdiction in matters of prize law. He submitted there that it would be dangerous to expose the Court to the necessity of pronouncing on matters in regard to which the law is unsettled and controversial. See *Lauterpacht in Economica*, June 1930, pp. 163-168.

<sup>2</sup> See the literature quoted above at the beginning of § 390a.

<sup>3</sup> By an Exchange of Notes of May 19, 1927, between Great Britain and the United States the two Governments put into effect an agreement providing, *inter alia*, that neither of them will present any diplomatic

claim or request for international arbitration on behalf of their nationals alleging loss or damage through the war measures adopted by the other. The same agreement provides that its conclusion does not prejudice the juridical position of either Government, and that each Government may in the future 'maintain such position as it may deem appropriate with respect to the legality or illegality under international law of measures' covered by the relevant part of the agreement. See Treaty Series, No. 14 (1927), *A.J.*, xxi. (1927) p. 542, and the comment thereon by Borchard, *ibid.*, pp. 764-768. See also Exchange of Notes between the United Kingdom and Holland, of March 22, 1929: Treaty Series, No. 9 (1929).

between two conflicting principles : the freedom of neutral trade and the right of the belligerent to prevent such commerce with the opposing party as might be of military advantage to the latter. International Law has not evolved any overriding principle reconciling these claims in cases when they show a tendency to conflict. The compromise has frequently been the function of the relative military and political strength of the belligerents and neutrals. This absence of an overriding principle shows itself in the hitherto unsolved difficulty, which proved of crucial importance during the World War, of answering the question as to whether the belligerents or the neutrals ought to bear the brunt of the changed conditions of modern warfare.

The existing materials of prize law as embodied in the practice of States, in judicial decisions, and in the writings of jurists, must certainly be studied as being of great interest for the history and, to some extent, for the philosophy of International Law ; as supplying the basis of any future attempts to arrive at agreed rules of prize law should the conditions of the world make it incumbent upon Governments and lawyers to devote their determined efforts to that end ; and, in the absence of such international agreement, they must be studied as enabling legal opinion to determine somehow to what extent certain claims and assertions are dictated by the arbitrariness of belligerent power or by neutral insistence on abnormal profits rather than by considerations of principle and justice as revealed in or deducible from the component elements of prize law. To the existing ingredients of prize law recent developments in International Law have added one consideration of vital significance, namely, that as a rule the war will be waged on one side in violation of a legal obligation of a fundamental nature. In such a contingency the guilty belligerent will not be able to claim the benefit of the doubt in a branch of law in which so much is controversial and unsettled. The same factor may weaken the appeal of the neutral to the juridical strength of his position. Moreover, even in cases admitting of no controversy the neutral will frequently be prevented from a strict insistence on his rights as against the attacked

party or the States which, in pursuance of their international obligations, take action against the aggressor. He will be so prevented either in consequence of express engagements like those laid down in the Covenant of the League<sup>1</sup> or by moral considerations flowing from the fact that the war has been undertaken in violation of the General Treaty for the Renunciation of War.<sup>2</sup>

<sup>1</sup> See above, §§ 292a *et seq.*

<sup>2</sup> On the effect of that Treaty on neutrality see above, §§ 292h-292i.

The editor has left this section entirely as it was written in 1935.



# APPENDIX

## TABLE OF RATIFICATIONS, ADHESIONS, AND DENUNCIATIONS IN RESPECT OF THE CONVENTIONS SIGNED AT THE SECOND HAGUE CONFERENCE

ON OCTOBER 18, 1907<sup>1</sup>

(The dates given in this Table are also those of the entry into force of the ratification, of the adhesion, or of the denunciation.)

### *Argentina.*<sup>2</sup>

### *Australia.*

Ratified Conventions II-IV, VI-IX, XI (January 26, 1910).  
Ratified Convention XIV<sup>3</sup> (November 27, 1909).  
Denounced Convention VI (November 14, 1926).

### *Belgium.*

Ratified Conventions I, III-XI, XIII (October 7, 1910).  
Ratified Convention XIV<sup>3</sup> (August 8, 1910).

### *Bolivia.*

Ratified Conventions I, III-V, IX-X (January 26, 1910).  
Ratified Convention XIV<sup>3</sup> (November 27, 1909).

### *Brazil.*

Ratified Conventions I, III-XI, XIII (March 6, 1914).  
Ratified Convention XIV<sup>3</sup> (January 5, 1914).

### *Bulgaria.*<sup>2</sup>

### *Canada.*

Ratified Conventions II-IV, VI-IX, XI (January 26, 1910).  
Ratified Convention XIV<sup>3</sup> (November 27, 1909).  
Denounced Convention VI (November 14, 1926).

### *Chile.*<sup>2</sup>

### *China.*

Ratified Conventions I, X (January 26, 1910).  
Ratified Convention XIV<sup>3</sup> (November 27, 1909).  
Adhered to Conventions II, III, V, IX, XIII (March 16, 1910).  
Adhered to Conventions IV, VI-VIII, XI (July 9, 1917).

### *Colombia.*<sup>2</sup>

### *Cuba.*

Ratified Conventions I, IV-VI, IX, X (April 22, 1912).

<sup>1</sup> I am indebted to the Netherlands Government for having placed at my disposal the information which enabled me to compile this Table.

For a list of the Conventions referred to below see p. viii above. The reservations appended by the various signatory or ratifying States are printed in *The Reports to the Hague Conferences of 1899 and 1907*, edited by Scott (1917), pp. 902-911. The present Table shows the position at the end of 1939.

<sup>2</sup> Has not ratified any Convention.

<sup>3</sup> 'Convention XIV' is here used as an abbreviation for the Declaration relating to the launching of projectiles or explosives from balloons or other kinds of aerial vessels.

*Denmark.*

Ratified Conventions I - XI,  
XIII (January 26, 1910).

*Dominican Republic.*<sup>1</sup>*Ecuador.*<sup>1</sup>*Finland.*

Adhered to Conventions I-XI,  
XIII, XIV<sup>2</sup> (June 9, 1922).

*France.*

Ratified Conventions I - XI,  
XIII (December 6, 1910).  
Denounced Convention VI  
(July 13, 1940).

*Germany.*

Ratified Conventions I - XI,  
XIII (January 26, 1910).

*Great Britain.*

Ratified Conventions II-IV, VI-  
IX, XI (January 26, 1910).  
Ratified Convention XIV<sup>2</sup>  
(November 27, 1909).  
Denounced Convention VI  
(November 14, 1926).

*Greece.*<sup>1</sup>*Guatemala.*

Ratified Conventions I - XI,  
XIII (May 14, 1911).

*Haiti.*

Ratified Conventions I - XI,  
XIII (April 3, 1910).  
Ratified Convention XIV<sup>2</sup>  
(February 2, 1910).

*Holland.* (See *Netherlands.*)*Hungary.*

Ratified Conventions I - XI,  
XIII (January 26, 1910).

*India.*

Ratified Conventions II-IV, VI-  
IX, XI (January 26, 1910).

Ratified Convention XIV<sup>2</sup>  
(November 27, 1909).

Denounced Convention VI  
(November 14, 1926).

*Iran.* (See *Persia.*)*Ireland.*

Ratified Conventions II-IV, VI-  
IX, XI (January 26, 1910).

Ratified Convention XIV<sup>2</sup>  
(November 27, 1909).

Denounced Convention VI  
(November 14, 1926).

*Italy.*

Ratified Convention X (April  
16, 1937).

*Japan.*

Ratified Conventions I - XI,  
XIII (February 11, 1912).

*Latvia.*

Adhered to Convention X  
(June 7, 1923).

*Liberia.*

Adhered to Conventions II-IX,  
XI, XIII (April 5, 1914).

Adhered to Convention XIV<sup>2</sup>  
(February 4, 1914).

*Luxemburg.*

Ratified Conventions I, III-XI,  
XIII (November 4, 1912).

Ratified Convention XIV<sup>2</sup>  
(September 5, 1912).

*Mexico.*

Ratified Conventions I - XI,  
XIII (January 26, 1910).

Denounced Convention II  
(April 21, 1932).

*Netherlands.*

Ratified Conventions I - XI,  
XIII (January 26, 1910).

Ratified Convention XIV<sup>2</sup>  
(November 27, 1909).

<sup>1</sup> Has not ratified any Convention.<sup>2</sup> See n. 3 on p. 739.

*New Zealand.*

Ratified Conventions II-IV, VI-IX, XI (January 26, 1910).  
 Ratified Convention XIV<sup>1</sup> (November 27, 1909).  
 Denounced Convention VI (November 14, 1926).

*Nicaragua.*

Adhered to Conventions I-XI, XIII (February 14, 1910).  
 Adhered to Convention XIV<sup>1</sup> (December 16, 1909).

*Norway.*

Ratified Conventions I-XI, XIII (November 18, 1910).  
 Ratified Convention XIV<sup>1</sup> (September 19, 1910).

*Panama.*

Ratified Conventions I-XI, XIII (November 10, 1911).  
 Ratified Convention XIV<sup>1</sup> (September 11, 1911).

*Paraguay.*

Ratified Convention I (June 24, 1933).

*Persia (Iran).<sup>2</sup>**Peru.<sup>2</sup>**Poland.*

Adhered to Convention I (May 26, 1922).  
 Adhered to Conventions III-V (July 8, 1925).  
 Adhered to Conventions VI, VII, IX-XI (July 30, 1935).

*Portugal.*

Ratified Conventions I-VII, IX-XI, XIII (June 12, 1911).  
 Ratified Convention XIV<sup>1</sup> (April 13, 1911).

*Roumania.*

Ratified Conventions I, III-XI, XIII (April 30, 1912).

*Russia (Union of Soviet Socialist Republics).*

Ratified Conventions I-VII, IX, X, XIII (January 26, 1910).

*Salvador.*

Ratified Conventions I-XI, XIII (January 26, 1910).  
 Ratified Convention XIV<sup>1</sup> (November 27, 1909).

*Serbia (Yugoslavia).<sup>2</sup>**Siam (Thailand).*

Ratified Conventions I, III-XI, XIII (May 11, 1910).  
 Ratified Convention XIV<sup>1</sup> (March 12, 1910).

*South Africa (Union of).*

Ratified Conventions II-IV, VI-IX, XI (January 26, 1910).  
 Ratified Convention XIV<sup>1</sup> (November 27, 1909).  
 Denounced Convention VI (November 14, 1926).

*Spain.*

Ratified Conventions I-III, V-VII, X, XI (May 17, 1913).  
 Adhered to Convention IX (April 25, 1913).

*Sweden.*

Ratified Conventions I, III-VII, IX, XI, XIII (January 26, 1909).  
 Ratified Convention X (September 11, 1911).

*Switzerland.*

Ratified Conventions I, III-XI, XIII (July 11, 1910).  
 Ratified Convention XIV<sup>1</sup> (May 12, 1910).

<sup>1</sup> See n. 3 on p. 739.<sup>2</sup> Has not ratified any Convention.

<i>Turkey.</i> <sup>1</sup>	Ratified Convention XIV: (November 27, 1909).
<i>Union of Soviet Socialist Republics.</i> (See <i>Russia.</i> )	Adhered to Convention XIII (February 1, 1910).
<i>United States of America.</i> Ratified Conventions I-V, VIII- XI (January 26, 1910).	<i>Uruguay.</i> <sup>1</sup> <i>Venezuela.</i> <sup>1</sup> <i>Yugoslavia.</i> (See <i>Serbia.</i> )

<sup>1</sup> Has not ratified any Convention.

<sup>2</sup> See n. 3 on p. 739.

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